TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted]50.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

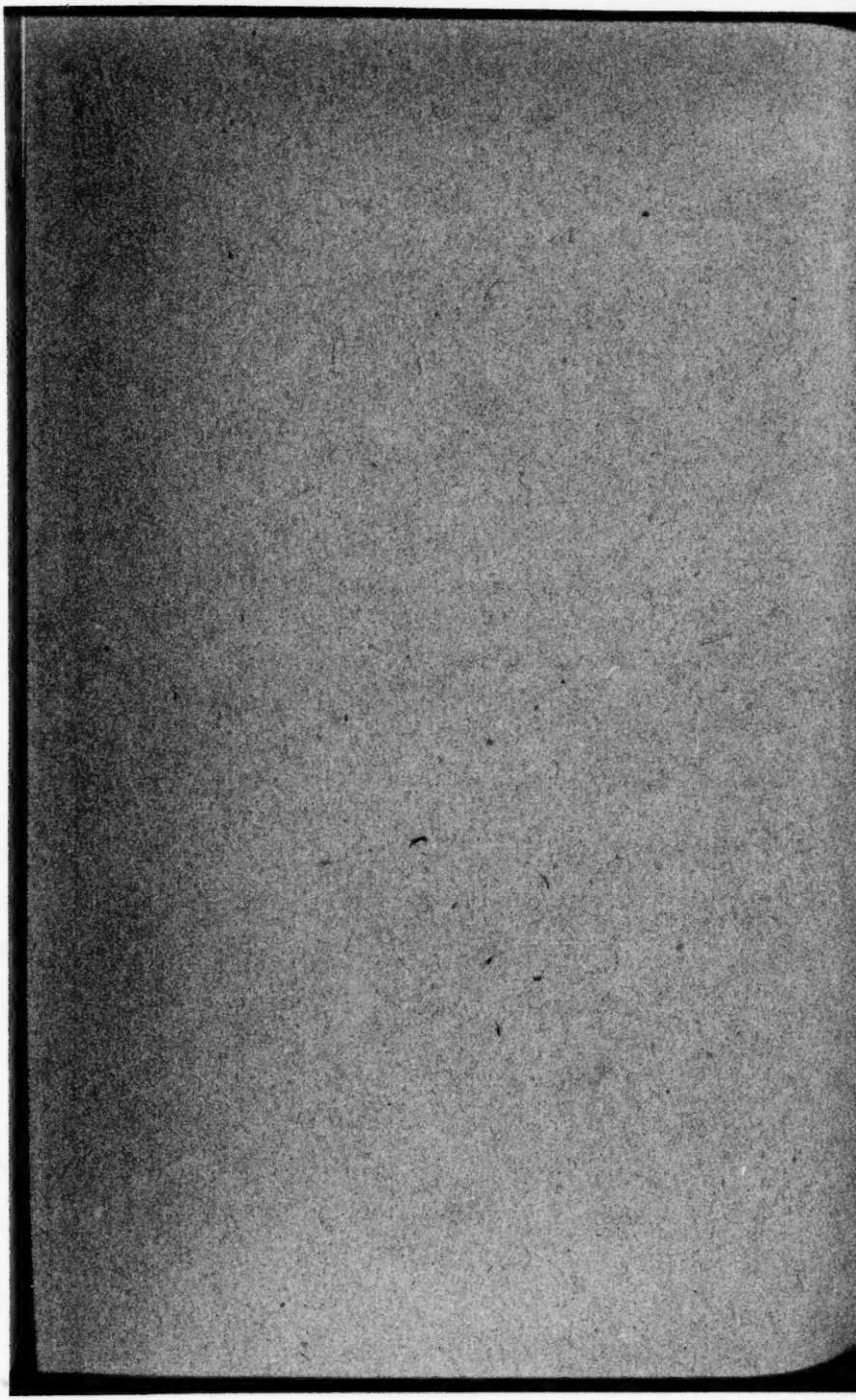
vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED AUGUST 6, 1910.

(21,291)



(21.291)

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OCTOBER TERM, 1909.

No. 226.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Caption.*

Pleas Before Hon. E. W. Winfield, Judge of the Pulaski Circuit Court, Second Division Thereof, Had on the 18th Day of November, 1907, in the Case of

(Nos. 2957 & 2958.)

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Action to recover penalty for failure to comply with Act requiring defendant to maintain three brakemen on all freight trains of more than twenty-five cars in length.

Judgment for $100 in each case, for Plaintiff.

2 *Complaint.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Complaint at Law.

The plaintiff, the State of Arkansas, by Lewis Rhoton, Prosecuting Attorney of the Sixth Judicial Circuit, complains of the defendant, the Chicago, Rock Island & Pacific Railway Company, and for cause of action, states:

That the said defendant, the Chicago, Rock Island & Pacific Railway Company is a foreign corporation, engaged in the railroad business and in the transportation of intra state freight over railroad lines in the State of Arkansas, and that the acts herein complained of occurred in the County of Pulaski, State of Arkansas, since the 1st day of May, 1907.

That the defendant, the Chicago, Rock Island & Pacific Railroad Company on the 5th day of May, 1907, operated and run a freight train containing more than twenty-five cars in Pulaski County without having equipped the same with as many as three brakemen. The said train being freight train No. 42, engine No. 1836 and being operated in an easternly direction from Argenta, Arkansas, to Hopefield, Arkansas, and over a railroad more than fifty miles in length. That the operation of said train in the manner as aforesaid, without having equipped said train with as many as three brakemen was in violation of the law. That by so operating said train in violation of the law of Arkansas, the said defendant became indebted to the State of Arkansas in the sum of $500.00.

Wherefore plaintiff prays judgment against the defendant in the sum of $500.00.

LEWIS RHOTON,
Prosecuting Attorney of the Sixth Judicial Circuit.

3 Endorsed: "Filed and summons issued May 25th, 1907. P. H. Carnes, Clerk, by R. B. Brodie, D. C."

4 *Proceedings, June 13th, 1907.*

2957.

STATE OF ARKANSAS, Plaintiff,
v.
CHICAGO, ROCK ISLAND AND PACIFIC RY. CO., Defendant.

Comes the defendant by its attorneys, Buzbee & Hicks, and by leave of the Court, files herein its answer and demurrer to the complaint.

5 *Answer & Demurrer.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Answer and Demurrer.

I.

For answer, defendant says:

It admits that it is a corporation engaged in the railroad business and in the transportation of freight over railroad lines in the State of Arkansas.

It admits that on the 5th day of May, 1907, it operated and ran a freight train, containing more than twenty-five cars, in Pulaski County, without having equipped the same with as many as three brakemen. It admits that said train was a freight train, No. 42, Engine No. 1836, and that said train was operated in an easterly direction from Argenta, Arkansas, to Hopefield, Arkansas, and over a railroad more than fifty miles in length, but defendant states that said train was engaged in carrying interstate commerce and was, in fact, being operated from the City of Argenta, in the State of Arkansas, to the City of Memphis, in the State of Tennessee; that Hopefield is an intermediate station between Argenta and Memphis, and it was, therefore, necessary for said train to pass through Hopefield on its journey from Argenta to Memphis, as aforesaid.

It denies that the operation of said train, in the manner aforesaid, without having equipped said train with as many as three brakemen, was in violation of law; and denies that by so operating said train it became indebted to the State of Arkansas, in the sum of $500.00.

6 II.

And for a further defense, defendant says:

That the Act of Arkansas, No. 116, entitled, "An Act to prescribe the minimum number of employees to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act," approved March 28th, 1907, under which it is sought to recover from the defendant in this suit, is unconstitutional and void, for the following reasons:

(*a.*) Said act, in requiring that each freight train consisting of more than twenty-five cars shall be equipped with a conductor and three brakemen, regardless of any modern equipment, or automatic couplers, and air brakes, is arbitrary, unreasonable, and not a proper exercise of the police powers of the State

(*b.*) Said act, in applying to freight trains more than twenty-five cars in length, and exempting freight trains less than twenty-five cars in length, grants privileges and immunities to companies and officers of court operating freight trains less than twenty-five cars in length which are not granted to companies and officers of court operating freight trains more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains more than twenty-five cars in length which are not granted to conductors and brakemen employed on freight trains less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section Eighteen, Article Two, of the Constitution of Arkansas.

(*c.*) Said Act, in applying to freight trains more than twenty-five cars in length, and exempting freight trains less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains more than twenty-five cars in length, and to conductors and brakemen employed by companies and officers of court operating freight

7 trains less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section One of the Fourteenth Amendment to the Constitution of the United States.

(*d.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad of more than fifty miles in length and exempting companies or officers of court owning or operating lines of railroad less than fifty miles in length, grants privileges and immunities to companies and officers of court operating lines of railroad less than fifty miles in length, which are not granted to companies and officers of court operating lines of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed on lines of railroad more than fifty miles in length, which are not granted to conductors and brakemen, employed on lines of railroad less than fifty miles in length, and is, therefore, contrary to, and in conflict with section Eighteen, Article Two, of the Constitution of Arkansas.

(*e.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad more than fifty miles in length, and exempting companies or officers of court operating lines of railroad less than fifty miles in length, is a denial of the equal protection of the laws to said companies, and officers of court, operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*f.*) Said Act, in applying to companies and officers of court, operating lines of railroad more than fifty miles in length, and exempting companies and officers of court owning and operating lines of railroad of less than fifty miles in length, is a denial of the equal protection of the laws to conductors and brakemen employed by companies or officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section One of the Fourteenth Amendment to
8 the Constitution of the United States.

(*g.*) Defendant alleges that it operates within the State of Arkansas, six hundred and fourteen miles of railroad; that said line of railroad consists of main track and several branches less than fifty miles in length; and it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are more than twenty-five cars in length; that some of said trains are operated upon its main line and some of said trains are operated upon its branches less than fifty miles in length; that the fines imposed by said Act of Arkansas, No. 116, Approved March 28th, 1907, are such that if defendant failed to comply with said Act, on each of its freight trains over twenty-five cars in length operated in the State of Arkansas, the fines to which it would be subject would amount to a large sum, to-wit: about $12,500.00 per day, and, if continued during the time necessary to test the validity of said Act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said Act are, therefore, so excessive and burdensome as to deprive defendant of its right to have the validity of said Act tested by the Courts, and have the effect of depriving the defendant of its property without due process of law and of denying to it the equal protection of the laws; that said Act is, therefore contrary to and in conflict with Article Two, Section Nine, of the Constitution of Arkansas, and of Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*h.*) Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars and could be stopped by the application of the air brakes by the engineer of said train, without the intervention or assistance of the conductor or brakemen, as required by Act of Congress, and the order of the Interstate Commerce Com-
9 mission, made thereunder; that it had employed on said train a conductor and two brakemen and that the employment of another brakeman on said train was unnecessary because there were no duties connected with the running and operating of

said train to be performed by a third brakeman, and said Act, in attempting to require the defendant to employ three brakemen on said train attempted to require defendant to expend a large amount of money for a useless and unnecessary purpose, and to deprive the defendant of its property without due process of law, and is, therefore, in violation of and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*i.*) Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used for the transportation of freight *from points in the State of Arkansas, and points in other Territories and States west of the State of Arkansas, to Memphis, in the State of Tennessee*, and other points beyond the State of Arkansas, therefore, was engaged in moving Interstate traffic, into and through the State of Arkansas, and that said Act, in requiring the defendant to equip said train with three brakemen is an attempt to regulate commerce among the several States, and is, therefore, contrary to Section Eight, Article One, of the Constitution of the United States, and is contrary to and in conflict with the Act of Congress, approved March 2nd, 1893, and amended April 1st, 1896, entitled, "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers, engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," which was passed pursuant to the power vested in Congress by said Section Eight, Article One, of the Constitution of the United States.

(*j.*) Defendant states that said Act is void, because the subject matter thereof has been legislated upon by the Congress of the United States, in the Act approved March 2nd, 1893, and amended April 1st, 1896, and March 2nd, 1903, hereinbefore referred to.

10

III.

Defendant states that plaintiff is not entitled to recover in this suit because the plaintiff, acting by and through its prosecuting attorney, did on the 25th day of May, 1907, file information before D. Meisner, a Justice of the Peace of Big Rock Township, Pulaski County, Arkansas, alleging that defendant had committed the offense of operating a freight train with less than three brakemen over its lines of railroad; that said information charges defendant with the identical offense sued upon herein; that a summons was issued and served upon defendant, commanding it to appear and plead to the charge contained in said information; that said suit so instituted in the court of D. Meisner, Justice of the Peace, is still pending, and is a bar to the cause of action sued upon herein.

IV.

And defendant demurs to the complaint herein, and for cause says:

That the same does not state facts sufficient to constitute a cause of action against it.

Wherefore, defendant prays to be dismissed.

BUZBEE & HICKS,
Attorneys for Defendant.

Endorsed: Filed June 13th, 1907. P. H. Carnes, Clerk, By R. B. Brodie, D. C.

11 *Order Filing Amended Answer and Demurrer.*

Proceeding Monday, Nov. 18th, 1907.

2957.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

On this day comes the defendant and by leave of court files herein its amended answer and demurrer, and by agreement of parties, it is ordered that said amended answer and demurrer take the place of the original answer and demurrer filed herein.

12 *Amended Answer and Demurrer.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY. Defendant.

Answer and Demurrer.

I.

For answer, defendant says:

It admits that it is a corporation engaged in the railroad business and in the transportation of freight over railroad lines in the State of Arkansas.

It admits that on the 5th day of May, 1907, it operated and ran a freight train, containing more than twenty-five cars in Pulaski County, without having equipped the same with as many as three brakemen. It admits that said train was a freight train, No. 42, Engine No. 1836, and that said train was operated in an easterly direction from Argenta, Arkansas, to Hopefield, Arkansas, and over a railroad of more than fifty miles in length, but defendant states that said train was engaged in carrying interstate commerce, and was, in fact, being operated from the City of Argenta, in the State of Arkansas, to the City of Memphis, in the State of Tennessee that Hopefield is an intermediate station between Argenta, and Memphis, and it was, therefore, necessary for said train to pass through Hopefield on its journey from Argenta to Memphis, as aforesaid.

It denies that the operation of said train, in the manner aforesaid, without having equipped said train with as many as three brakemen, was in violation of law; and denies that by so operating

said train it became indebted to the State of Arkansas in the sum of $500.00, or in any other sum.

13 II.

And, for further defense, defendant says:

That the Act of Arkansas, No. 116, entitled, "An Act to prescribe the minimum number of employés to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act," approved March 28th, 1907, under which it is sought to recover from the defendant in this suit, is unconstitutional and void, for the following reasons:

(*a.*) Said Act, in requiring that each freight train consisting of more than twenty-five cars shall be equipped with a conductor and three brakemen, regardless of any modern equipment, or automatic couplers, and air brakes, is arbitrary and unreasonable, and not a proper exercise of the police powers of the State.

(*b.*) Said Act, in applying to freight trains of more than twenty five cars in length, and exempting freight trains of less than twenty five cars in length, grants privileges and immunities to companies and officers of court operating freight trains of less than twenty-five cars in length which are not granted to companies and officers of court operating freight trains of more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains of more than twenty-five cars in length which are not granted to conductors and brakemen employed on trains of less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section Eighteen, Article Two, of the Constitution of Arkansas.

(*c.*) Said Act, in applying to freight trains of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains of more than twenty-five cars in length and to conductors and brakemen employed by companies and officer of court operating freight trains of less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section One, of the Fourteenth
14 Amendment to the Constitution of the United States.

III.

(*a.*) Defendant states that there are in the State of Arkansas, many companies and officers of court owning and operating lines of railroad more than fifty miles in length and operating thereon, freight trains of more than twenty-five cars and that there are many companies and officers of court owning and operating lines of railroad less than fifty miles in length and operating thereon freight trains of more than twenty-five cars.

That while this defendant owns and operates more than fifty miles of railroad, it also owns and operates, in the State of Arkansas, many branches less than fifty miles in length, over which it operates freight trains of more than twenty-five cars; that the operation of said freight trains over said branches is in all respects similar in

the operation of freight trains over lines of railroads of companies and officers of court owning and operating railroads less than fifty miles in length.

(*b.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad more than fifty miles in length and exempting companies or officers of court owning or operating lines of railroad of less than fifty miles in length, grants privileges and immunities to companies and officers of court owning and operating lines of railroad less than fifty miles in length which are not granted to this defendant, and to other companies and officers of court owning and operating lines of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed by companies and officers of court owning and operating lines of railroad more than fifty miles in length, which are not granted to conductors and brakemen employed by this defendant and other companies and officers of court owning and operating lines of railroad less than fifty miles in length, and is,
15 therefore, contrary to and in conflict with Section Eighteen, Article Two, of the Constitution of Arkansas.

(*c.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad of more than fifty miles in length, and exempting companies or officers of court operating lines of railroad of less than fifty miles in length is a denial of the equal protection of the laws to this defendant and other companies, and officers of court operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*d.*) Said Act, in applying to this defendant and to other companies and officers of court, operating lines of railroad more than fifty miles in length, and exempting companies and officers of court owning and operating lines of railroad less than fifty miles in length, is a denial of the equal protection of the laws to conductors and brakemen employed by companies or officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

IV.

Defendant alleges that it operates within the State of Arkansas, six hundred and fourteen miles of railroad; that said line of railroad consists of main track and several branches of less than fifty miles in length; that it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are of more than twenty-five cars in length; that some of said trains are operated upon its main line and some of said trains are operated upon its branches of less than fifty miles in length; that the fines imposed by said Act of Arkansas, No. 116, approved March 28th, 1907, are such that if defendant failed to comply with said
16 Act, on each of its freight trains over twenty-five cars in length, operated in the State of Arkansas, the fines to which it would be subject, would amount to a large sum, to-wit: about

$12,500.00 per day, and, if continued during the time necessary to test the validity of said Act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said Act are, therefore, so excessive and burdensome as to deprive the defendant of its right to have the validity of said Act tested by the Courts, and have the effect of depriving the defendant of its property without due process of law and of denying to it the equal protection of the laws; that said Act is, therefore, contrary to and in conflict with Article Two, Section Nine, of the Constitution of Arkansas, and of Section One of the Fourteenth Amendment to the Constitution of the United States.

V.

Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars and could be stopped by the application of the air brakes by the engineer of said train, without the intervention or assistance of the Conductor or brakemen, as required by Act of Congress, and the order of the Interstate Commerce Commission, made thereunder; that it had employed on said train a conductor and two brakemen and that the employment of another brakeman on said train was unnecessary, because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said Act, in attempting to require the defendant to employ three brakemen on said train, attempted to require the defendant to expend a large amount of money for a useless and unnecessary purpose, and to deprive the defendant of its property without due process of law, and is, therefore, in violation of and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

17

VI.

(*a.*) Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used solely for the transportation of freight from points in the State of Arkansas, and points in other Territories and States west of the State of Arkansas, to Memphis, in the State of Tennessee, and other points beyond the State of Arkansas, and, therefore, was engaged in moving interstate traffic, into and through the State of Arkansas, and that said Act, in requiring the defendant to equip said train with three brakemen, is an attempt to regulate commerce among the several States, and is, therefore, contrary to Section Eight, Article One, of the Constitution of the United States, and is contrary to and in conflict with the Act of Congress, approved March 2nd, 1893, and amended April 1st, 1896, entitled "An Act to promote the safety of employés and travelers upon railroads by compelling common carriers, engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," and the Act of Congress approved June 11, 1906, entitled, "An Act

relating to liability of common carriers in the District of Columbia and territories, and common carriers engaged in commerce between the States and between the States and foreign nations to their employés," and the Act of Congress, approved June 29, 1906, entitled, "An Act to amend an Act entitled, "An Act to regulate commerce," approved February fourth, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and other Acts of Congress, which were passed pursuant to the power vested in Congress by said Section Eight, Article One, of the Constitution of the United States.

18 (*b.*) Defendant states that said Act is void, because the subject matter thereof has been legislated upon by the Congress of the United States, by the Acts hereinbefore referred to.

VII.

And defendant demurs to the complaint herein, and for cause says:

That the same does not state facts sufficient to constitute a cause of action against it.

Wherefore, defendant prays to be dismissed.

BUZBEE & HICKS,
Attorneys for Defendant.

Endorsed: Filed Nov. 18th, 1907. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

19 *Defendant's Requests for Findings of Law & Facts.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
v.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

The defendant requests the court to make the following findings of law and facts:

1. The verdict in this case will be for the defendant.

2. The employment and use of three brakemen on the train of defendant was unnecessary for the safety and protection of the employés on said train or the public, and there were no duties reasonably necessary which required the employment and use of the third brakeman on said train.

3. The employment and use of an engineer, fireman, conductor and two brakemen on freight trains of more than twenty-five cars is ample and sufficient for the safe and practical handling of said trains, and the employment of an additional third brakeman thereon is not reasonably necessary for the safety of said train, the employés thereon or the public.

4. The act of the Legislature of Arkansas, No. 116, entitled, "An Act to prescribe the minimum number of employés to be used in

the operation of freight trains in this State, and providing a penalty for the violation of this Act," approved March 28th, 1907, requiring the use of three brakemen on freight trains of more than twenty-five cars, is unconstitutional and void, because the same makes unreasonable requirement and is beyond the scope of the police powers of the State.

Endorsed: Filed Nov. 18th, 1907. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

20 *Complaint.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Complaint at Law.

The plaintiff, the State of Arkansas, by Lewis Rhoton, Prosecuting Attorney of the Sixth Judicial Circuit, complains of the defendant, the Chicago, Rock Island & Pacific Railway Company, and for cause of action, states:

That the said defendant, the Chicago, Rock Island & Pacific Railway Company is a foreign corporation, engaged in the railroad business and in the transportation of intra-state freight over railroad lines in the State of Arkansas, and that the acts herein complained of occurred in the county of Pulaski, State of Arkansas, since the —— day of ——, 1907.

That the defendant, the Chicago, Rock Island & Pacific Railroad Company on the 30th day of April, 1907, operated and run a freight train containing more than twenty-five cars in Pulaski County without having equipped the same with as many as three brakemen. The said train being freight train No. 31, engine No. 1878, and being operated in a westerly direction from Hopefield, Arkansas, to Argenta, Arkansas, and over a railroad more than fifty miles in length. That the operation of said train in the manner as aforesaid, without having equipped said train with as many as three brakemen was in violation of the law. That by so operating said train in violation of the law of Arkansas, the said defendant became indebted to the State of Arkansas in the sum of $500.00.

Wherefore plaintiff prays judgment against the defendant in the sum of $500.00.

LEWIS RHOTON.
Prosecuting Attorney of the Sixth Judicial Circuit.

21 Endorsed: "Filed and summons issued May 25th, 1907. P. H. Carnes, Clerk, by R. B. Brodie, D. C."

22 *Order Filing Answer & Demurrer, #2958.*

Proceedings, June 13th, 1907.

2958.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RY. CO., Defendant.

Comes the defendant by its attorneys, Buzbee & Hicks, and by leave of the court files herein its answer and demurrer to the complaint.

23 *Answer & Demurrer.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Answer and Demurrer.

I.

For answer, Defendant says:

It admits that it is a corporation engaged in the railroad business and in the transportation of freight over railroad lines in the State of Arkansas.

It admits that on the 30th day of April, 1907, it operated and ran a freight train, containing more than twenty-five cars, in Pulaski County, without having equipped the same with as many as three brakemen. It admits that said train was a freight train, No. 31, Engine No. 1878, and that said train was operated in a westerly direction from Hopefield, Arkansas, to Argenta, Arkansas, and over a railroad more than fifty miles in length, but defendant states that said train was engaged in carrying interstate commerce and was, in fact, being operated from the City of Memphis, in the State of Tennessee, to the City of Argenta, in the State of Arkansas; that Hopefield is an intermediate station between Memphis and Argenta, and it was, therefore, necessary for said train to pass through Hopefield on its journey from Memphis to Argenta, as aforesaid.

It denies that the operation of said train, in the manner aforesaid, without having equipped said train with as many as three brakemen, was in violation of law; and denies that by so operating said train it became i-debted to the State of Arkansas, in the sum of $500.00.

24 II.

And, for a further defense, defendant says:

That the Act of Arkansas, No. 116, entitled, "An Act to prescribe the minimum number of employés to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act," approved March 28th, 1907, under which it is sought to recover from the defendant in this suit, is unconstitutional and void, for the following reasons:

(*a.*) Said Act, in requiring that each freight train consisting of more than twenty-five cars shall be equipped with a conductor and three brakemen, regardless of any modern equipment, or automatic couplers, and air brakes, is arbitrary, unreasonable, and not a proper exercise of the police powers of the State.

(*b.*) Said Act, in applying to freight trains more than twenty-five cars in length, and exempting freight trains less than twenty-five cars in length, grants privileges and immunities to companies and officers of court operating freight trains less than twenty-five cars in length which are not granted to companies and officers of court operating freight trains more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains more than twenty-five cars in length which are not granted to conductors and brakemen employed on freight trains less than twenty five cars in length, and is, therefore, contrary to and in conflict with Section Eighteen, Article Two, of the Constitution of Arkansas.

(*c.*) Said Act, in applying to freight trains more than twenty-five cars in length, and exempting freight trains less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains more than twenty-five cars in length, and to conductors and brakemen employed by companies and officers of court operating freight trains less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section One of the Fourteenth Amend-

25 ment to the Constitution of the United States.

(*d.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad of more than fifty miles in length and exempting companies or officers of court owning or operating lines of railroad less than fifty miles in length, grants privileges and immunities to companies and officers of court operating lines of railroad less than fifty miles in length, which are not granted to companies and officers of court operating lines of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed on lines of railroad more than fifty miles in length, which are not granted to conductors and brakemen, employed on lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with section Eighteen, Article Two, of the Constitution of Arkansas.

(*e.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad more than fifty miles in length and exempting companies or officers of court operating lines of

railroad less than fifty miles in length, is a denial of the equal protection of the laws to said companies, and officers of court, operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*f.*) Said Act, in applying to companies and officers of court, operating lines of railroad more than fifty miles in length, and exempting companies and officers of court owning and operating lines of railroad of less than fifty miles in length, is a denial of the equal protection of the laws to conductors and brakemen employed by companies or officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*g.*) Defendant alleges that it operates within the State of
26 Arkansas, six hundred and fourteen miles of railroad; that said line of railroad consists of main track and several branches less than fifty miles in length; and it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are more than twenty-five cars in length; that some of said trains are operated upon its main line and some of said trains are operated upon its branches less than fifty miles in length; that the fines imposed by said Act of Arkansas, No. 116, Approved March 28th, 1907, are such that if defendant failed to comply with said Act, on each of its freight trains over twenty-five cars in length operated in the State of Arkansas, the fines to which it would be subject would amount to a large sum, to wit: about $12,500.00, per day, and, if continued during the time necessary to test the validity of said Act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said Act are, therefore, so excessive and burdensome as to deprive the defendant of its right to have the validity of said Act tested by the Courts, and have the effect of depriving the defendant of its property without due process of law and of denying to it the equal protection of the laws; that said Act is, therefore, contrary to and in conflict with Article Two, Section Nine, of the Constitution of Arkansas, and of Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*h.*) Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars and could be stopped by the application of the air brakes by the engineer of said train, without the intervention or assistance of the conductor or brakemen, as required by Act of Congress and the order of the Interstate Commerce Commission, made thereunder; that it had employed on said train a conductor
27 and two brakemen and that the employment of another brakeman on said train was unnecessary because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said Act, in attempting to require the defendant to employ three brakemen on said train,

attempted to require defendant to expend a large amount of money for a useless and unnecessary purpose, and to deprive the defendant of its property without due process of law, and is, therefore, in violation of and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*i.*) Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used for the transportation of freight *from the City of Memphis, in the State of Tennessee, and other points outside of the State of Arkansas, to points within the State of Arkansas,* and points beyond the State of Arkansas, and, therefore, was engaged in moving interstate traffic, into and through the State of Arkansas, and that said Act, in requiring the defendant to equip said train with three brakeman is an attempt to regulate commerce among the several States, and is, therefore, contrary to Section Eight, Article One, of the Constitution of the United States, and is contrary to and in conflict with the Act of Congress, approved March 2nd, 1893, and amended April 1st, 1896, entitled, "An Act to promote the safety of employés and travelers upon railroads by compelling common carriers, engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," which was passed pursuant to the power vested in Congress by said Section Eight, Article One, of the Constitution of the United States.

(*j.*) Defendant states that said Act is void, because the subject matter thereof has been legislated upon by the Congress of the United States, in the Act approved March 2nd, 1893, and amended April 1st, 1896, and March 2nd, 1903, hereinbefore referred to.

28

III.

Defendant states that plaintiff is not entitled to recover in this suit because the plaintiff, acting by and through its prosecuting attorneys, did on the 25th day of May, 1907, file information before D. Meisner, a Justice of the Peace of Big Rock Township, Pulaski County, Arkansas, alleging that defendant had committed the offense of operating a freight train with less than three brakemen over its lines of railroad; that said information charges defendant with the identical offense sued upon herein; that a summons was issued and served upon defendant, commanding it to appear and plead to the charge contained in said information; that said suit so instituted in the Court of D. Meisner, Justice of the Peace, is still pending, and is a bar to the cause of action sued upon herein.

IV.

And defendant demurs to the complaint herein, and for cause says:

That the same does not state facts sufficient to constitute a cause of action against it.

Wherefore, defendant prays to be dismissed.

BUZBEE & HICKS,
Attorneys for Defendant.

Endorsed: Filed June 13th, 1907. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

29 *Order Filing Amended Answer & Demurrer.*

Proceedings, Nov. 18th, 1907.

2958.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

On this day comes the defendant and by leave of court files herein its amended answer and demurrer, and by agreement of parties, it is ordered that said amended answer and demurrer take the place of the original answer and demurrer filed herein.

30 *Amended Answer & Demurrer.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

Answer and Demurrer.

I.

For answer, defendant says:

It admits that it is a corporation engaged in the railroad business and in the transportation of freight over railroad lines in the State of Arkansas.

It admits that on the 30th day of April, 1907, it operated and ran a freight train, containing more than twenty-five cars in Pulaski County, without having equipped the same with as many as three brakemen. It admits that said train was a freight train, No. 31, Engine No. 1878, and that said train was operated in an easterly direction from Argenta, Arkansas, to Hopefield, Arkansas, and over a railroad of more than fifty miles in length, but defendant states that said train was engaged in carrying interstate commerce, and was, in fact, being operated from the City of Argenta, in the State of Arkansas, to the City of Memphis, in the State of Tennessee; that Hopefield is an intermediate station between Argenta, and Memphis, and it was, therefore, necessary for said train to pass through Hopefield on its journey from Argenta to Memphis, as aforesaid.

It denies that the operation of said train, in the manner aforesaid, without having equipped said train with as many as three brakemen, was in violation of law; and denies that by so operating

said train it became indebted to the State of Arkansas in the sum of $500.00, or in any other sum.

31 II.

And for further defense, defendant says:

That the Act of Arkansas, No. 116, entitled, "An Act to prescribe the minimum number of employés to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act," approved March 28th, 1907, under which it is sought to recover from the defendant in this suit, is unconstitutional and void, for the following reasons:

(*a.*) Said Act, in requiring that each freight train consisting of more than twenty-five cars shall be equipped with a conductor and three brakemen, regardless of any modern equipment, or automatic couplers, and air brakes, is arbitrary and unreasonable, and not a proper exercise of the police powers of the State.

(*b.*) Said Act, in applying to freight trains of more than twenty five cars in length, and exempting freight trains of less than twenty five cars in length, grants privileges and immunities to companies and officers of court operating freight trains of less than twenty-five cars in length which are not granted to companies and officers of court operating freight trains of more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains of more than twenty-five cars in length which are not granted to conductors and brakemen employed on freight trains of less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section Eighteen, Article Two, of the Constitution of Arkansas.

(*c.*) Said Act, in applying to freight trains of more than twenty five cars in length, and exempting freight trains of less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains of more than twenty-five cars in length and to conductors and brakemen employed by companies and officers of court operating freight trains of less than twenty-five cars in length, and is, therefore, contrary to
32 and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

III.

(*a.*) Defendant states that there are in the State of Arkansas, many companies and officers of court owning and operating lines of railroad more than fifty miles in length and operating thereon, freight trains of more than twenty-five cars and that there are many companies and officers of court owning and operating lines of railroad less than fifty miles in length and operating thereon freight trains of more than twenty-five cars.

That while this defendant owns and operates more than fifty miles of railroad, it also owns and operates, in the State of Arkansas, many branches less than fifty miles in length, over which it operates freight trains of more than twenty-five cars; that the operation of said freight trains over said branches is in all respects similar to the

operation of freight trains over lines of railroads of companies and officers of court owning and operating railroads less than fifty miles in length.

(*b.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad more than fifty miles in length, and exempting companies or officers of court owning or operating lines of railroad of less than fifty miles in length, grants privileges and immunities to companies and officers of court owning and operating lines of railroad less than fifty miles in length which are not granted to this defendant, and to other companies and officers of court owning and operating lines of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed by companies and officers of court owning and operating lines of railroad more than fifty miles in length, which are not granted to conductors and brakemen employed by this defendant and other companies and officers of court owning and
33 operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section Eighteen, Article Two, of the Constitution of Arkansas.

(*c.*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad of more than fifty miles in length, and exempting companies or officers of court operating lines of railroad of less than fifty miles in length is a denial of the equal protection of the laws to this defendant and other companies and officers of court operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*d.*) Said Act, in applying to this defendant and to other companies and officers of court, operating lines of railroad more than fifty miles in length, and exempting companies and officers of court owning and operating lines of railroad less than fifty miles in length, is a denial of the equal protection of the laws to conductors and brakemen employed by companies and officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

IV.

Defendant alleges that it operates within the State of Arkansas, six hundred and fourteen miles of railroad; that said line of railroad consists of main track and several branches of less than fifty miles in length; that it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are of more than twenty-five cars in length; that some of said trains are operated upon its main line and some of said trains are operated upon its branches of less than fifty miles in length; that the fines imposed by said Act of Arkansas, No. 116, approved March 28th.
34 1907, are such that if defendant failed to comply with said Act, on each of its freight trains over twenty-five cars in length, operated in the State of Arkansas, the fines to which it would be subject, would amount to a large sum, to-wit: about $12,500.00

per day, and, if continued during the time necessary to test the validity of said Act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said Act are, therefore, so excessive and burdensome as to deprive the defendant of its right to have the validity of said Act tested by the courts, and have the effect of depriving the defendant of its property without due process of law and of denying to it the equal protection of the laws; that said Act is, therefore, contrary to and in conflict with Article Two, Section Nine, of the Constitution of Arkansas, and of Section One, of the Fourteenth Amendment to the Constitution of the United States.

V.

Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars and could be stopped by the application of the air brakes by the engineer of said train, without the intervention or assistance of the conductor or brakemen, as required by Act of Congress, and the order of the Interstate Commerce Commission, made thereunder; that it had employed on said train a conductor and two brakemen and that the employment of another brakemen on said train was unnecessary, because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said Act, in attempting to require the defendant to empl-y three brakemen on said train, attempted to require the defendant to expend a large amount of money for a useless and
35 unnecessary purpose, and to deprive the defendant of its property without due process of law, and is, therefore, in violation of and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

VI.

(*a.*) Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used for the transportation of freight from points in the State of Arkansas, and points in other Territories and States west of the State of Arkansas, to Memphis, in the State of Tennessee, and other points beyond the State of Arkansas, and, therefore, was engaged in moving interstate traffic, into and through the State of Arkansas, and that said Act, in requiring the defendant to equip said train with three brakemen, is an attempt to regulate commerce among the several States, and is, therefore, contrary to Section Eight, Article One, of the Constitution of the United States, and is contrary to and in conflict with the Act of Congress, approved March 2nd, 1893, and amended April 1st, 1896, entitled "An Act to promote the safety of employés and travelers upon railroads by compelling common carriers, engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," and the Act of Congress approved June 11th, 1906, entitled, "An

Act relating to liability of common carriers in the District of Columbia and territories, and common carriers engaged in commerce between the States and between the States and foreign nations to their employés" and the Act of Congress, approved June 29, 1906, entitled, "An Act to amend an Act entitled, "An Act to regulate commerce," approved February fourth, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and other Acts of Congress, which were passed pur-
36 suant to the power vested in Congress by said Section Eight, Article One, of the Constitution of the United States.

(*b.*) Defendant states that said Act is void, because the subject matter thereof has been legislated upon by the Congress of the United States, by the Acts hereinbefore referred to.

(*c*) Defendant admits, however, that, in addition to the interstate commerce carried upon said train, it also carried intra-state commerce between points in the State of Arkansas.

VII.

And defendant demurs to the complaint herein, and for cause says:

That the same does not state facts sufficient to constitute a cause of action against it.

Wherefore, defendant prays to be dismissed.

BUZBEE & HICKS,
Attorneys for Defendant.

Endorsed: Filed Nov. 18th, 1907. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

37 *Defendant's Requests for Findings of Law & Facts.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff.
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Defendant.

The defendant requests the court to make the following findings of law and facts:

1. The verdict in this case will be for the defendant.

2. The employment and use of three brakemen on the train of defendant was unnecessary for the safety and protection of the employés on said train or the public, and there were no duties reasonably necessary which required the employment and use of the third brakeman on said train.

3. The employment and use of an engineer, fireman, conductor and two brakemen on freight trains of more than twenty-five cars is ample and sufficient for the safe and practical handling of said trains, and the employment of an additional, or third brakeman

thereon is not reasonably necessary for the safety of said train, the employés thereon or the public.

4. The Act of the Legislature of Arkansas, No. 116, entitled, "An Act to prescribe the minimum number of employés to be used in the operation of freight trains in this State, and providing a penalty for the violation of this act," approved March 28th, 1907, requiring the use of three brakemen on freight trains of more than twenty-five cars, is unconstitutional and void, because the same makes an unreasonable requirement and is beyond the scope of the police powers of the State.

Endorsed: Filed Nov. 18th, 1907. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

38 *Demurrer of Plaintiff.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Demurrer of Plaintiff.

Comes the plaintiff, the State of Arkansas, by Lewis Rhoton, as prosecuting attorney, and demurs to the first, second, third, fourth and sixth paragraphs of the defendant's answer, and to each part of said paragraphs, and for cause states:

That no one of said paragraphs, nor any part of any of said paragraphs state facts sufficient to constitute a defense to plaintiff's cause of action, nor do all of said paragraphs and their parts taken together state facts sufficient to constitute a defense to plaintiff's cause of action.

Wherefore, plaintiff asks that said paragraphs in defendant's answer, and each part of said paragraphs herein demurred to, be dismissed.

LEWIS RHOTON,
Prosecuting Attorney.

F. H. DODGE,
Of Counsel.

Endorsed: Filed Nov. 18th, 1907. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

39 *Demurrer of Plaintiff* #2957.

Proceeding Nov. 18th, 1907.

2957.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Now on this day comes the State of Arkansas, and files its demurrer to the first, second, third, fourth and sixth paragraphs and to each part of said paragraphs, of the defendant's answer.

And the demurrer of the defendant to the plaintiff's complaint coming on to be heard, the court doth overrule said demurrer, to which action of the court in overruling said demurrer the defendant saved its exceptions.

And the demurrer of the plaintiff to the answer of the defendant coming on to be heard, the court doth sustain said demurrer to each paragraph of the answer of defendant numbered 1, 2, 3, 4 and 6, and to each part of said paragraphs, to which action of the court in sustaining the demurrer to each of said paragraphs numbered 1, 2, 3, 4 and 6, and each part of each of said paragraphs, the defendant saved its several separate exceptions.

The plaintiff thereupon moved the court to render judgment in its favor upon the pleadings. The court overruled said motion, and the plaintiff saved its exceptions.

It was agreed between the parties hereto that the defendant is a corporation organized under the laws of the States of Illinois and Iowa, and that on the 24th day of March, 1904, it had entered the State of Arkansas, and had complied with all of the conditions of the laws of the State of Arkansas authorizing foreign railroad corporations to do business in said State.

By agreement this cause was consolidated with No. 2958, for the purpose of a trial on paragraph five of the answer, and it was
40 agreed between the parties hereto that the same testimony should apply to both cases, and in the event of an appeal the same bill of exceptions and transcript should be used in both cases.

This case, thereupon, coming on to be heard on the Fifth paragraph of the answer of defendant, the same was, by agreement, tried before the court, and the court being well and sufficiently advised in the premises, doth find in favor of the plaintiff.

Judgment #2957.

It is, therefore, by the court, considered, ordered and adjudged that the plaintiff do have and recover of and from the defendant the sum of One Hundred Dollars ($100.00) and all its costs herein expended, and that it have execution therefor.

41 *Demurrer of Plaintiff.*

In the Pulaski Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Demurrer of Plaintiff.

Comes the plaintiff, the State of Arkansas by Lewis Rhoton, as prosecuting attorney, and demurs to the first, second, third, fourth and sixth paragraphs of the defendant's answer, and to each part of said paragraphs, and for cause states:

That no one of said paragraphs, nor any part of any of said paragraphs states facts sufficient to constitute a defense to plaintiff's cause of action, nor do all of said paragraphs and their parts taken together state facts sufficient to constitute a defense to plaintiff's cause of action.

Wherefore plaintiff asks that said paragraphs in defendant's answer, and each part of said paragraphs herein demurred to, be dismissed.

LEWIS RHOTON,
Prosecuting Attorney.

F. H. DODGE,
Of Counsel.

Endorsed: "Filed Nov. 18th, 1907. P. H. Carnes, Clerk. By R. B. Brodie, D. C.

42 *Demurrer of Plaintiff* #2958.

Proceeding Nov. 18, 1907.

2958.

STATE OF ARKANSAS, Plaintiff,
v.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

Now on this day comes the State of Arkansas and files its demurrer to the first, second, third, fourth and sixth paragraphs, and to each part of said paragraphs, of the defendant's answer.

And the demurrer of the defendant to the plaintiff's complaint coming on to be heard, the court doth overrule said demurrer, to which action of the court in overruling said demurrer the defendant saved its exceptions.

And the demurrer of the plaintiff to the answer of the defendant, coming on to be heard, the court doth sustain said demurrer to each

paragraph of the answer of defendant numbered 1, 2, 3, 4, and 6, and to each part of said paragraphs, to which action of the court in sustaining the demurrer to each of said paragraphs number 1, 2, 3, 4 and 6, and each part of each of said paragraphs the defendant saved its several separate exceptions.

The plaintiff, thereupon, moved the court to render judgment in its favor upon the pleadings. The court overruled said motion, and the plaintiff saved its exceptions.

It was agreed between the parties hereto that the defendant is a corporation organized under the laws of the States of Illinois and Iowa, and that on the 24th day of March, 1904, it had entered the State of Arkansas, and had complied with all of the conditions of the laws of the State of Arkansas authorizing foreign railroad corporations to do business in said State.

By agreement this cause was consolidated with No. 2957, for the purpose of a trial on paragraph five of the answer, and it was agreed between the parties hereto that the same testimony should
43 apply to both cases, and in the event of an appeal the same bill of exceptions and transcript should be used in both cases.

Judgment #2958.

This cause, thereupon, coming on to be heard on the Fifth paragraph of the answer of defendant, the same was, by agreement, tried before the court, and the court being well and sufficiently advised in the premises, doth find in favor of the plaintiff. It is therefore, by the court, considered, ordered and adjudged that the plaintiff do have and recover of and from the defendant the sum of One Hundred Dollars ($100.00) and all its costs herein expended, and that it have execution therefor.

44 *Order Overruling Motion for New Trial* # 2957.

Proceeding Nov. 18, 1907.

2957.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Defendant.

On this day comes the defendant and files its motion for a new trial, and the same being considered by the court, it is ordered that said motion for a new trial be overruled. To which ruling of the court in overruling said motion for a new trial, the defendant saved its exceptions, and prays an appeal to the Supreme Court of Arkansas, which is hereby granted and the defendant is given ninety days within which to prepare and file its bill of exceptions.

45 *Order Overruling Motion for New Trial* #2958.

STATE OF ARKANSAS, Plaintiff.
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Defendant.

On this day comes the defendant and files its motion for a new trial, and the same being considered by the court, it is ordered that said motion for a new trial be overruled.

To which ruling of the court, in overruling said motion for a new trial, the defendant saved its exceptions, and prays an appeal to the Supreme Court of Arkansas, which is hereby granted, and the defendant is given ninety days within which to prepare and file its bill of exceptions.

46 *Order Filing Bill of Exceptions.*

Proceedings Feb. 1st, 1908.

Nos. 2957 & 2958.

STATE OF ARKANSAS, Plaintiff,
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Defendant.

Comes the defendant by its attorneys and presents to the court its bill of exceptions and upon examination thereof the same is found correct and signed and ordered filed and made a part of the record in this case.

47 *Bill of Exceptions.*

In the Pulaski Circuit Court, Second Division.

STATE OF ARKANSAS, Plaintiff.
vs.
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant.

This cause coming on to be heard on this 16th day of November, 1907, and the same being submitted to the court sitting as a jury, the following proceedings were had, to-wit:

It was agreed that the train in question in this case comes within the act of Congress and the rules of the Interstate Commission made thereunder, and that there was on said train an engineer, a fireman, a conductor, and two brakemen. This agreement goes to the 5th paragraph of the answer.

The court held that the burden of proof was upon the defendant, under the pleadings in the case, to which action of the court in so holding the defendant at the time saved its exceptions.

The attorney for the State moved that the defendant be not permitted to introduce any evidence and asked that the court declare a verdict for the plaintiff on the pleadings in the case; which was overruled by the court, and plaintiff saved exceptions.

The attorney for the State then asked that specific exceptions be saved to each witness testifying, and to each question and answer of each witness. The court stated that plaintiff's objections to each witness and to each question and answer, would be overruled and its exceptions noted.

Thereupon the case went to trial upon the 5th paragraph of the answer.

48 *Testimony of W. S. Tinsman.*

The defendant, in order to maintain its defense, introduced the following evidence, to-wit:

W. S. TINSMAN, being first duly sworn, testified as follows:

Q. Mr. Tinsman, where do you live?

A. Evanston, Illinois.

Q. What is your business?

A. I am employed by the Rock Island Railway Company.

Q. What position do you hold with the Rock Island Railway Company?

A. I am Assistant General Manager.

Q. Over what part of the line do you have jurisdiction?

A. Over the Rock Island lines.

Q. How long have you been in the railroad business?

A. I think I started May 1st, 1891.

Q. In what capacity, Mr. Tinsman, did you start, and state to the court, without further questions, the different capacities in which you have served?

A. I started as a call boy; was an operator for two or three years; was then a trick dispatcher; and Chief dispatcher; Train Master; Superintendent; General superintendent, and from that to the position I am now holding.

Q. With what roads have you been connected?

A. None except the Rock Island Railway Company.

Q. Have you ever been located at Little Rock for that Company?

A. Yes sir.

Q. When and in what capacity?

A. I was General Superintendent of the Choctaw District from June 1905, until September, 1906.

Q. Did that embrace all of the lines of that company within the State of Arkansas?

A. Yes sir.

49 Q. In the operation of through freight trains over the Rock Island in Arkansas and elsewhere how many brakemen are employed?

A. Two.

Q. Suppose that you employ on those freight trains another

brakeman—a third brakeman—what duties would there be for him to perform, assuming that the two brakemen already employed comply with their duties?

A. None that I think of.

Q. Now state, Mr. Tinsman, what are the duties of the two brakemen employed on a through freight train, how they are assigned on the train?

A. Well, we have what we call a head brakeman and a rear brakeman on our through freight trains.

Q. What are the duties of each of these brakemen, taking the head brakeman first?

(The COURT:)

Q. And where is he located on the train?

A. He is the forward brakeman; he works at the forward end of the train; looks after getting his engine out and coupling up the train. I could hardly go ahead and describe all his duties.

Q. In a general way?

A. He has the care of the forward end of the train.

Q. What about the rear brakeman?

A. He has similar duties with regard to the rear end of the train, and protecting the rear end. He goes out and stops following trains in case they are stopped out on the line.

Q. Have either of these brakemen anything to do with the mechanical part of stopping and starting the train?

A. No sir.

Q. Is it necessary for them, with the present equipment of trains, to set hand brakes?

A. Not under any ordinary circumstances. The rules of the Interstate Commerce Commission require that we have
50 seventy-five per cent of the equipment air brakes, and that is sufficient to control the train; even less would do that; but under certain circumstances, such as the train parting, they might be required to set brakes on the rear end of the train.

Q. If there are any cars on the train not equipped with air where are they located?

A. On the rear end of the train.

Q. That is necessary so as to get the air cars in connection with the engine?

A. Yes sir.

Q. Mr. Tinsman, before the introduction of air brakes and automatic couplers on freight trains, what were the duties of brakemen in reference to starting and stopping trains?

A. With reference to starting the trains, nothing but the signals; in stopping the trains, the train was controlled by hand brakes It was necessary then in stopping trains to set hand brakes on each car; had to set a sufficient number to control the train. They had to be set on each car individually until enough were set to control the train. That is not necessary under the present equipment of trains.

Q. Were you in the railroad service before the introduction of air brakes?

A. No, we had a few air brakes when I went to work, as I recollect it, but not a great many.

Q. How many brakemen, has the Chicago, Rock Island and Pacific Railway Company used on through freight trains since you have been connected with it?

A. Two brakemen on through freight trains.

Q. That has been true since your connection with it in 1891?

A. Yes sir, since 1881. I have been connected with the Rock Island since 1881, instead of 1891.

51 Q. And even at that time the Rock Island only found use for two brakemen?

A. Yes sir.

Cross-examination by Mr. RHOTON, for the State:

Q. You never acted in the capacity of a conductor of a freight train, did you?

A. Never regularly assigned as such; I have made a few trips.

Q. Never acted in the capacity of a brakeman?

A. No sir.

Q. How often did you ever act as conductor of a freight train?

A. I couldn't tell you; probably half a dozen times.

Q. When was that?

A. In 1890.

Q. That was before they had seventy-five per cent of air brakes?

A. It was before we had seventy-five per cent, although on part of the line I was running, at that time it was an unusual thing not to get sufficient air cars to take care of the train.

Q. You say it is necessary to put the cars that don't have air brakes in the rear. That is not absolutely necessary, is it?

A. If they are piped it is not.

Q. So your statement that it is necessary to put the non-air-brake cars in the rear is conditional?

A. We have a few piped cars.

Q. Would not the best equipment for the operation of the railroad require that every non-air brake car be piped in order that it may readily fit in anywhere in the train?

A. Would not be a case of necessity.

Q. I mean that if you pick up a car that is not equipped with air brakes or piped you have to shift it around to get it in the rear?

A. Yes sir.

52 Q. If it was piped you would not have to shift it around, but just fit it in anywhere?

A. Yes sir.

Q. So the best equipment would be to have every car piped?

A. Yes sir.

Q. You have a good many cars that are not piped and have no air brakes?

A. Yes sir.

Q. And those cars are used in the operation of the trains?

A. Yes sir.

Q. Under the old hand brake system, about how many cars did you operate in the ordinary freight train?

A. I would say when I commenced working for the railroad that our trains would average fifteen to twenty cars.

Q. What was the capacity of the cars.

A. I think the highest capacity car we had at that time was 40,000.

Q. What is the average number of cars on freight trains now operated on the Iron Mountain and Rock Island Railways, and various railroads in Arkansas?

A. I couldn't speak for other railroads. I think our line (Rock Island) would show about an average of thirty-two cars.

Q. Don't they have many trains with fifty or sixty cars?

A. Yes sir.

Q. About what was the ton-age per car when you were operating fifteen or twenty cars to the train?

A. I could not, of course, answer that question. I think our largest car was 40,000 and our smallest 24,000.

Q. Twenty-four and forty makes how many?

A. Sixty-four.

Q. And divide that by two, it gives an average of about thirty-two.

A. I gave you 40,000 as the maximum size of the car.

53 Q. In your judgment, what was the average ton-age per car under the old system?

A. I never had given that any thought.

Q. It is an important question involved in this case?

A. Just wait a minute. I would say that the average would come somewhere about 35,000, from 30 to 40 thousand.

Q. What is now about the average ton-age per car?

A. I should think if we get an average of sixty thousand it would be about right.

Q. So then you say that under the old system, you operated from fifteen to twenty cars; that now you operate an average of about thirty-two cars?

A. Yes sir.

Q. Putting you say, sixteen cars under the old system, and now thirty-two, the average doubled?

A. Yes sir.

Q. And under the old system you drew a ton-age of thirty-five thousand?

A. Yes sir.

Q. And now you have sixty thousand?

A. Yes sir.

Q. You have doubled the number of cars, and doubled the ton -age of the cars?

A. Yes sir.

Q. What is the average motive power under the old system when you had the hand brakes, when you were sent out on those half dozen trips?

A. I would like to say at the time I started to work the maximum was 40,000 and the minimum 24,000. Now, in 1900, the maximum

had greatly increased. In 1900 I think we were operating not less than twenty-five per cent air.

54 Q. What was the average motive power ten years ago in Arkansas on the Rock Island and Iron Mountain?

A. I don't know anything about the power in Arkansas ten years ago.

Q. Now you say that in the operation of the freight trains on the Choctaw Division of the Rock Island, that the brakemen have nothing to do with controlling the speed of the train or stopping or starting; that is governed by the engineer?

A. Yes sir, under ordinary conditions.

Q. Are you quite sure of that?

A. I am sure it is correct.

Q. The Railway Company, in formulating its rules, formulates rules that are best adapted to the operation of the train?

A. They try to do that.

Q. I believe you stated a moment ago that if the train separated that the brakemen would need to control it by the brakes on the rear end of the train?

A. Only on the hand brake cars.

Q. If it broke, would not that break the air?

A. It would break the air, but that sets the brakes.

Q. If the trains separates before the brakes are set at all by the engine—after the train breaks in two do you say that the brake will set itself?

A. Yes sir.

Q. Don't the air leak and impair the strength of these air brakes in holding the train?

A. I don't know that I could say how long it would take for the air to leak out; if it is working perfectly it would not leak off at all.

Q. If it would not leak after the separation, why would it be necessary for the brakemen to take hold any more than before it broke?

55 A. I stated that on the assumption that part of it was non-air cars.

Q. Then you say if it was all air cars, and it broke, that it would not be necessary for the brakemen to use the hand brakes?

A. No sir, it would not be.

Q. Have you ever been on the train to know whether or not that was true?

A. Yes sir.

Q. How many cars broke loose?

A. I have known a great many trains that broke in two in the air.

Q. Did the brakemen undertake to stop it at all?

A. No sir, no occasion for it.

Q. Don't the brakemen do anything at all?

A. No sir.

Q. How long would the train stand?

A. Until we could back up and couple up.

Q. How long did the break exist; how long did that particular train you were on?

A. I have no particular train in mind. I would say twenty or thirty minutes.

Q. This particular train you were on?

A. I have been on a great many.

Q. What was the longest one you were ever on that there was no intervention on the part of the brakemen to control the part that was broken off, and how many cars were in the rear?

A. I don't remember. They were delayed a good while.

Q. The front portion is supposed to *to* as quickly as it is discovered?

A. We have a rule to keep out of the way.

Q. There is a rule in the hands of the brakemen which says: "Brakemen must stop their trains at stations and control them in descending heavy grades, without waiting for the signal
56 from the engineman, and must be careful to avoid the sliding or heating of the wheels." Now if the rule requires the brakemen to control the train at stations and on descending grades, don't that require the use of the hand brakes; and if that requires them to control the train on descending grades and going into stations, how is it that they have nothing to do with the speed of the train or stopping?

A. I assume that rule was intended and was operative when it was necessary for the brakemen to assist in the stopping and controlling of the trains. Our rule has not been changed since the change of the per cent of air.

Q. Your rules have been published since?

A. I think in 1894, when we were required to have 50 per cent air.

Q. When did the order of the Railroad Commission requiring seventy-five per cent go into force?

A. I can't give you the date now.

Q. Was it not in 1900? I mean didn't the law requiring the trains to be so equipped that the engineer could control the speed of the train without the intervention of the hand brakes go into effect August 1st, 1900?

A. I can't tell you as to the date.

Q. Don't you know it went into effect about that time?

A. The law went into effect and then we were granted additional time; there were two or three postponements, as I recollect.

Q. Didn't the law go into effect requiring the freight trains to be so equipped with air brakes so the engineer could control it on August 1st, 1900?

A. I couldn tell you the date.

Q. Don't you know, now, Mr. Tinsman, if you are keeping up with the rules of the road, as part of the rules directing the operation of freight trains on this system, require the brakeman to control the train on descending grades, and to control them when entering stations?

57 A. There is such a rule in the card, I believe.

Q. Don't such a rule imply that they do it with hand brakes?

A. The rule is in the book, but I know they are not doing it.

Q. (Book of rules shown witness.) This is the rule promulgated by the Chicago, Rock Island and Pacific Railway Company?

A. Yes sir.

Q. Is it not true that the law requiring the engine to be so equipped to enable the engineer to control the train without the intervention of the hand brakes went into effect August 1st, 1900, and that you promulgated and put into the hands of the brakemen the rule four years after that?

A. Yes sir.

Q. And is not that the rule, right now the rule, that you have in the hands of every brakeman in Arkansas to fix his duties?

A. Yes sir.

Q. Now, then, if you have in the hands of your brakemen a rule to control the trains in going into stations, and descending grades have you not commanded every brakeman to do that, and if he does not do it, don't he violate a rule that you put into his hands and command him to observe?

A. He violates that rule.

Q. Can you make a reasonable explanation of why you have in the hands of your brakemen in Arkansas today a rule that commands them to use hand brakes on descending grades, and to use hand brakes in going into stations, and one which they violate if they don't do it?

A. The explanation is that at the time the Company started to put out their book of rules they were only required to have twenty-five per cent of air cars. By the time the book was out they were required to have fifty per cent, and then it was raised to seventy-five per cent. In getting a greater per centage of air the rule was not necessary. That is the only explanation I can make.

58 Q. I only asked you about the law. Didn't that originally require them to have air enough to control the speed of the train from the engine?

A. I think it did.

Q. At the time you promulgated these rules didn't they require you to have air enough to control the train from the engine?

A. I can't recall now just how that law read.

Q. And don't you know that now that is all that is required of you; that the only purpose of the Interstate Commerce Commission requiring you to have seventy-five per cent air is simply to require you to have air enough to control the speed of the train?

(Objected to by defendant as incompetent, irrelevant and immaterial; objection overruled and defendant saved its exceptions.)

Q. Is not that the intention of the law? I mean to say, seventy-five per cent; is it not deemed that seventy-five per cent air is sufficient to control the speed of the train?

A. Yes sir.

Q. Now then, if that is true, you are now required to furnish air enough to control the speed of the train?

A. We are doing so, yes sir.

Q. When you put this book of rules into effect, showing that you

must have the brakemen controlling the train on descending grades and going into stations, you were then required to have enough to control the speed of the train?

A. I don't remember about that. We used to control the trains so as not to require the brakemen to touch a brake with much less than twenty-five per cent.

Q. If at the time you put this rule into operation you were required to have enough to control the train, and you are now required to have enough to control the train, what change is there to require any change? Is not the requirement on Congress
59 now just the same, because then it required you to control the train from the engine, and now it requires you to control the train from the engine?

A. It is my recollection that the original law contemplated that it would not be necessary for brakemen to go on top of the train and set a brake, and that law was to go into effect so soon as the railroads could *not* get in position to do it, and they were to fix twenty-five per cent, and then fifty per cent and then seventy-five per cent.

Q. Was it not true that the conditions of the act of Congress and the rules of the Interstate Commerce Commission were accepted by the Railway Company, and that they were to have air brakes sufficient that in going down heavy grades the engineer could control the train, but that the presence of the brakemen on top was necessary to take care of the train in any emergency that might arise?

A. I don't know just how to answer that.

Q. I just want you to make as clear and truthful an answer to it as you can. You started off with the proposition that the railway companies accepted it in 1900. Don't you know, right now, at this time, that you have seventy-five per cent of air, and don't you expect that in the operation of freight trains that where the engineer can control the train on ordinary grades, and yet you recognize the fact that on heavy grades in the emergency of the air giving out the use of the hand brakes is necessary for the securing of the train and the protection of the public generally?

A. No sir.

Q. Then your idea is that no condition arises, on heavy grades and going into stations—your statement is that the use of hand brakes is never necessary?

A. I testified a moment ago that the air brakes set when it breaks in two. If the air brakes get out of fix they might need to use the hand brakes.

Q. They do sometimes get out of fix?

60 A. Yes sir.

Q. Don't the Interstate Commerce Commission, in its last report, say that the air brakes are yet in an imperfect condition, and that the air brake has not yet reached the condition that they are always able to control the train?

A. I believe I read some such report as that.

Q. And does the railroad recognize such conditions as that the air brakes are not yet perfect, and sometimes work improperly and

get out of fix? Now, don't they recognize that in the operation of trains?

A. No sir, so far as the operation of the automatic air brake. We have instances of its getting out of order once in a while on account of improper handling of the air. But those things I think are explainable in the efficiency of the force.

Q. I will ask you, with the freight train now, with the tonnage you have of 60,000, with a freight train of fifty or sixty cars, going down grade, can two brakemen control that train with hand brakes? I mean if the air should give out on a descend grade, with that kind of a train, can two brakemen control it with hand brakes?

(By the COURT:)

Q. Could they control it as well as three?

A. No, they couldn't. Of course, three could handle it quicker than two.

Q. I will ask you if the air brakes have broken under that condition, if it would not be an impossibility for two men to control it with hand brakes, or might there be need for three?

A. Yes sir, sometimes.

Q. The air brake equipment is not perfect?

A. No. I don't suppose any mechanism is perfect.

Q. Is it not a fact that frequently in the operation of freight trains it does not give out?

A. I don't recall a case now where the air gave out so we were unable to hold the train.

61 Q. But you do say that if it should give out two brakemen could not control the train?

A. If it should give *it*. If the air just breaks it sets the brakes.

Q. Suppose it should not set the brakes?

A. Well, if it should not it may be three or four brakemen might not.

Q. Under the circumstances stated, going up grade, if the brakes should give out could two brakemen do the work?

A. It would be possible for two to do it; I don't think there would be a possibility that two could not prevent the train running back down grade.

Q. Mr. Tinsman, have you not a rule in the operation of your trains that if the air brakes do give out so that they won't work, that the speed of the train should be controlled by the brakemen?

A. I think probably there is.

Q. Now if they have a rule that says that if while the train is being operated the air does give out, that then the brakemen shall take charge of the train and bring it in, they could only control it by the hand brakes?

A. There is such a rule, I think.

Q. Is not there such a rule?

A. Yes sir.

Q. That if the air gives out the brakemen shall take charge of and control the speed of the train?

A. I think so.

Q. I will ask you how you could make a plainer recognition of the imperfection of the air brakes than that?

A. That includes the failure of the air brakes and also the pump on the engine.

Q. Suppose the pump gives out, your brakes would not work any longer, would they?

62 A. No sir.

Q. That pump is mechanical too and is liable to give out?

A. Yes sir.

Q. And if it should give out it stops the working of the brakes?

A. Yes sir.

Q. Suppose the pump gives out, that stops the air?

A. No, if the brakes are charged it does not; it would stop the train. The train don't start out without the train being charged.

Q. Don't they start trains out without the train being charged?

A. I don't know if I recollect that thing being done since 1904.

Q. Don't you have to send out frequently now to repair your air pump out on the line?

A. Yes sir.

Q. Then frequently in the operation of your train, the train don't have any air?

A. No sir, the train is standing on the sidetrack.

Q. The air pump does fail often, don't it?

A. It does fail occasionally; air pump gives out once in a while.

Q. If you move the train with the air brakes given out it requires the hand brakes to control the train?

A. Yes sir.

Q. It required two brakemen under the old system, with 15 to 20 cars, with an average ton-age of 35,000, can you say that a freight train with 32 cars, with an average ton-age of 60,000 could be handled as well with two brakemen? If you should operate it, wouldn't three brakemen be necessary?

A. On very little of our line. There are some places if two couldn't stop it three couldn't stop it.

Q. Would three do more than two?

A. Yes sir. Maybe four couldn't.

63 Q. Suppose your air does give out, can two control it as well as three?

A. No sir.

Q. Do you think two men could control the trains without air?

A. Sometimes they couldn't no sir.

Q. Then sometimes more than two would be necessary if your air gave out?

A. I don't know that more than two would be necessary.

Q. You say that two couldn't, or would find great difficulty in controlling it, then you will concede that more than two are needed in order to control it to the best advantage?

A. I don't know of circumstances under which the third brakeman would be required in our system.

Q. You have stated that on a grade two men would have greater

difficulty in controlling a train of that kind, if they could control it at all?

A. Under certain circumstances.

Q. Under those circumstances are not more than two men needed to control that train properly?

A. Three men would give additional braking power to the train and retard its action better.

Q. Three would control it better?

A. They would control its action more—four would.

Q. When a freight train is on a main line and they are trying to reach a sidetrack; for instance a freight train left here with orders to get to a sidetrack at Higgins five minutes before a passenger train coming into Little Rock was due there, and they left Sweet Home and after getting out some distance the air gave out. Now when they stopped, what was the duty of the rear brakeman?

A. To go back and flag.

Q. And the train was likely to be coming from the other direction what was the duty of the front brakeman?

64 A. If the train stood there until the time was up for the other train, to go out and flag the front. I believe it is the duty of the fireman under our rules.

Q. If the rear brakeman is to protect the rear end of the train and the head brakeman the front end, is there anybody there to manage that train except the conductor?

A. The conductor and fireman and engineer.

Q. If the fireman leaves the engine, the engineer has to take the fireman's place?

A. They are standing still. If they are standing there long enough he might do it.

Q. Now do you think a freight train of 60 cars, the rear brakeman back protecting the rear, and the front brakeman protecting the front, that it would be safer to have a third brakeman there protecting that train?

A. I don't see that it would be a question of safety at all; the train is standing still.

Q. Suppose they wanted to move back for the purpose of coupling up in order to be safe; now when they begin to couple up would it not be necessary to have a third brakeman?

A. Ordinarily, under the example you gave, the man would take his head end over to the other station and go back.

Q. They don't do that in this case? Suppose they haven't time to go off?

A. That is not the question at all; it is a question of a man having overlooked his orders; he is required to clear five minutes, as you put the question.

Q. Does it not occur when they get into stations; when they run with these full trains, they run into a station where they haven't time to get on the switch, and trains have to saw-by, and a train coming from the other direction, is it the duty of the brakeman to protect both your front and your rear end?

65 A. Yes sir.

Q. Suppose they are in a station where they have to pick up cars, they have to protect the rear, don't they?

A. Yes sir.

Q. Whenever a train stops it is the duty of the brakemen to go back and protect the rear?

A. Under our rules, it is.

Q. If a train is likely to come from the other direction, is it not the duty to protect the front?

A. Duty to protect the front if there is any other train; that sometimes occurs.

Q. They are in at the station where under the rules they have to protect the rear, and for the ordinary protection of the traveling public they have to protect the rear?

A. Under certain circumstances they have to.

Q. In doing switching around then the only one to give the signals would be the conductor?

A. Conductor, fireman and engineer, if they were compelled to switch under those circumstances.

Q. Is it not the duty of the conductor to get his orders from the operator himself? Does he not have to get his orders from the telegraph operator himself?

A. Yes sir.

Q. Now then, if you have sent the front brakeman out to the front and the rear brakeman to the rear and the conductor to the office to get his orders who is at that train to protect it?

A. The engineer and fireman.

(By Mr. HICKS:)

Q. The train would be doing nothing?

A. No sir.

(Mr. RHOTON:)

Q. Do you know how far through the foggy district of Arkansas—how far the light of a lantern can be seen giving the signal?

A. I don't know anything about that.

Q. You don't know anything about the signals through the foggy district of Arkansas, on foggy nights or foggy days?

A. I don't know the power of the light or how far it can be seen.

Q. Mr. Tinsman, do you now, in the operation of your freight trains keep your hand brakes in the same good condition that you did at the time you didn't have air brakes? Are they kept so they can just as readily applied and applied with as much force, with the same degree of human strength that they did before the air was put on?

A. As far as I know they are.

Q. How can you account for their keeping them in the same good condition that they did before the air brakes were put on unless the company itself realizes that emergencies do arise just as they did under the old system, to control the train?

A. It would be necessary in setting them out.

Q. It would not be necessary to keep them in that perfect condition that they did?

A. I haven't any information to the contrary. If they have not been kept up I don't know it.

Q. Suppose, as a matter of fact that your hand brakes were not kept in as good condition, and not so arranged that the power could be applied as readily or with as much force as under the old system, the defective condition of the brakes would demand an additional amount of human strength to stop the train as quick, would it not, as it did under the old system?

A. Probably so.

Q. Is it not true, Mr. Tinsman, that the amount of work to be done by the railroads, the amount of freight to move, has practically doubled within the last six or seven years?

67 A. Yes, there has been a very material increase.

Q. Now then, is it not true that this increased amount of work that is to be done by the railroads has more than taken the place of the advantage furnished the brakemen by the introduction of the automatic couplers and air brakes? Is it not true that there is more work to be done now on freight trains by the conductor and brakemen than there was ten or fifteen years ago, in the work you were then doing?

A. No sir, not in my opinion. I haven't actually done the work, but it would be my opinion that the character of the work of the brakemen is lighter now than it was ten or twelve years ago.

Q. Don't you have now, under the congested condition that the yards get in—are you not required to get it out quicker and make everything move faster than it did ten years ago?

A. That does not necessarily increase the work of the brakemen.

Q. Don't you say you are required to move it faster?

A. At all times in my experience we have tried to move it as fast as we could.

Q. Ho- much do the ordinary drawheads weigh now?

A. I don't know.

Q. Could two men handle one of them?

A. I think so.

Q. Have you ever, with one man, handled a drawhead—with one other man?

A. I have not.

Q. Have you ever handled one of the chains?

A. I have not.

Q. Don't you know that two men can't handle one of those chains?

A. I think so.

Q. They are much larger than they used to be?

A. I think some larger.

68 Q. Don't you know the drawheads are pulled out oftener now than under the old system?

A. I think some more.

Q. Under the old system they just had a link and pin and the link would break before the drawhead would pull out?

A. I think that was usually the case.

Q. This automatic coupler pulls out the drawhead?

A. If the coupler don't break.

Q. If the drawhead pulls out they have to bring another drawhead off of the train?

A. They don't put in a drawhead; put in a chain.

Q. If the rear man has to go to protect the rear, and the front brakeman ahead to protect the front, how would they manage about chaining it up?

A. I think there is no question but what two men could handle the chain.

Q. Would it not be better if they had a third man there to help out?

A. I don't know what good it could do except to have him there to work.

Q. It would be one more man to work?

A. Yes sir.

Q. Is it not a rule in the operation of a train that where the train divides that one man must stay with the rear of the train, at the rear?

A. Yes sir.

Q. And under the rule, one man must go back and protect that?

A. Yes sir, the rear man referred to in the rule.

Q. And one man has to stay with the rear of the train?

A. That is the man you are talking about; he sets two or three brakes and the caboose and goes back.

Q. Do you mean that he would do that and then he would go back?

69 A. He would go back.

Q. Wouldn't somebody have to be with that rear part?

A. The conductor is there.

Q. Suppose the conductor has to be in front; do you think that that rear end could be left there safely without anybody there?

A. Yes sir, I don't see any danger.

Redirect examination by Mr. BUZBEE:

Q. The only danger to be apprehended to that train would be the rear end?

A. Yes sir.

Q. And that is protected by this man who goes back?

A. Yes sir.

Q. The thing is to protect it from the rear end?

A. Yes sir.

Q. Could two men do that any better than one?

A. No sir.

Q. They asked you about the air brakes giving out when a train was in motion, running down grade. If that is done, is it not a fact that the air brakes work automatically, and that they set the train so it stops?

A. If the train breaks, or there is any imperfection in the air it sets the brakes automatically.

Q. And if there is a break on any part of the train, the brakes set immediately?

A. Yes sir.

Q. Without the assistance of brakemen?

A. Yes sir.

Q. Suppose you have 75 per cent of air brakes in a train, is it not a fact that that seventy-five per cent of air brakes is sufficient to control the train?

A. Yes sir.

70 Q. If the hand brakes have to be set where are the brakes that are to be set?

A. At the rear end, next the caboose, except where piped.

Q. Who would set those brakes?

A. The rear brakeman.

Q. Is there anything to prevent him setting them?

A. No sir.

Q. Anything to prevent the conductor from setting brakes if necessary?

A. No sir.

Q. I understand, Mr. Tinsman, that this rule referred to, requiring brakemen to control the train was gotten up at the time when that was necessary.

A. Yes sir. There is no necessity for it at this time.

Q. I will ask you, as a matter of fact, in the operation of trains on the Rock Island, if the brakemen are now required to control the rear end of the train?

A. No sir.

Q. Have you or your road, to your knowledge, ever censured or discharged a brakeman for failing to control the rear end of the train?

A. Not in a good many years; not since this book of rules was put in force.

Q. While that is in the book of rules, it is not in force now and is not complied with by the brakemen?

A. I think that is true.

Q. We asked you in regard to meeting trains at stations, where it is necessary to saw-by; the trains would not go by; the train is headed into the switch. What other duties could there be for that head brakeman to do except flag the train to protect it?

A. None.

Q. Does it require any flag-ing to protect the train in the

71 side track?

A. No sir.

Q. You were asked about the ton-age when you *were* commenced railroading. I will ask you as a matter of fact, while the ton-age has been increased, have the grades not been reduced and curves eliminated?

A. In a great many parts of the line.

Q. That is true on nearly all parts of the line where heavy trains are operated, is it not?

A. Yes sir.

Q. At the same time that that change has been going on, is it not also true that the engines have been improved and the braking power of the engines within itself and its ability to hold the train has been increased and improved?

A. The air having been applied to the engine, they have a braking power now that they didn't have at that time.

Q. If an engine is put in reverse motion now, it is also heavier and more able to hold the train than at that time?

A. Yes sir.

Q. I will ask you, as a matter of fact, if it is not easier to control a train under present conditions, an average train today than an average train in 1881, under present conditions?

A. Yes sir.

Q. And is it not easier to do that at this time than it was at that time with three men on through freight trains?

A. I have never had any experience with three men on through freight trains. Have never employed them on any railroad I have been with.

Q. Do you know anything about the southwest, whether any of the railroads employ three brakemen?

A. None of them except the Iron Mountain that I know of.

Q. Do you know of any that don't?

72 A. The Denver don't; T. P. & S. W.; Sante Fe; Burlington; Chicago & Alton; N. W. & St. P. In fact, I don't know of any railroad, roads west of Chicago, that I know of, that employ three brakemen.

Q. You were asked in reference to the necessity of three brakemen, on the supposition that certain things might happen. It sometimes happens, does it not, that a train will leave the track and that it is necessary to have a section crew and wrecking crew to put it back on?

A. Yes sir.

Q. Those are emergencies which might happen in the operation of trains?

A. Yes sir.

Q. But are they matters which ordinarily happen in the operation of trains?

A. No sir.

Q. Have you ever considered it necessary to carry facilities on all trains to meet these necessities—wrecking crews and wrecking outfits, or derricks?

A. No sir.

Recross-examination by Mr. RHOTON:

Q. Mr. Tinsman, the Choctaw road from here west to the Indian Territory is pretty crooked, is it not?

A. Yes sir.

Q. Got lots of grades?

A. One per cent maximum.

Q. So then your statement that the curves have been taken out does not apply here to the Indian Territory?

A. We don't consider that a heavy ton-age line.

Q. Do you know anything about the conditions at the Hot Springs Junction; do you know the necessity of brakemen at the Hot Springs Junction?

73 A. No sir.

Q. You say you never have discharged a brakeman for failure to obey this rule, requiring them to control their trains on grades and going into stations?

A. Not to my knowledge.

Q. Has the disobedience of that rule ever been reported to you?

A. Not that I remember.

Q. And so far as you know it has never been reported to you that they violate it?

A. I have a personal knowledge that they are not handling the trains by that rule.

Q. If they were going down grade and the necessity arose for them to apply them and they didn't do it, would you discharge them?

A. Yes sir, for failing to take care of his particular work, not violating that rule.

Q. If it was a violation of that rule, and it was shown to you that he didn't observe that rule, you would discharge him if the conditions arose that he had to observe that rule and he violated it?

A. If the conditions arose.

Q. Are not the men violating that rule to your knowledge?

A. They are violating it with respect to the controlling of the train.

74 *Testimony of J. W. Higgins.*

J. W. Higgins, a witness for the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Buzbee:

Q. What position do you now occupy, Mr. Higgins?

A. I am Assistant General Manager of the Missouri Pacific System.

Q. How long have you been engaged in the railroad service?

A. Since 1879.

Q. Will you state in what different capacities, during that time you have been engaged?

A. Been Messenger, track laborer, switchman, operator, freight brakeman, conductor, assistant superintendent, superintendent, assistant general manager.

Q. Have you had opportunity during these various employments to observe the operation of freight trains?

A. Yes sir.

Q. I would be glad — you would state what roads you have been connected with?

A. Burlington; Yazoo & Mississippi Valley; Grand Trunk; Missouri Pacific; and Illinois Central.

Q. Has it been part of your business to observe the operation of freight trains during that period?

A. Yes sir.

Q. I will ask you, prior to the passage of the Interstate Commerce law, in regard to safety appliances, and the equipment with air, how many brakemen were usually used on through freight trains?

A. Two on through freight trains.

Q. Since the passage of this law, and the order of the Commission requiring seventy-five per cent air, and also the improved equipment, state whether or not that has decreased or increased the necessity of brakemen on the train?

75 A. It has decreased the necessity.

Q. What were the duties of the brakemen before the passage of the act, and the rule requiring seventy-five per cent of air?

A. Had all the duties as at present, and in addition had to stop the train with hand brakes, and couple cars.

Q. Will you state how the train was stopped or handled by hand brakes. Were the brakes attached to each car separately?

A. Each car had its own brakes.

Q. A brakeman then would have to go from car to car?

A. Yes sir; and sometimes coon them in winter.

Q. Explain what you mean by "coon" them?

A. Have to get down on his hands in cold country. But, briefly, he had a landmark for each stopping place, and when they got to that he got out and commenced setting brakes, and would go from car to car.

Q. And with two brakemen?

A. Yes sir.

Q. Will you state how the brakemen are protected by the automatic coupler?

A. Today there are no links and pins; the cars couple automatically, without requiring the brakemen to go between the cars to make the coupling, and the engineer is responsible for the breaking of the train; he controls the train by application of the air brakes that is controlled from the engine.

Q. What duties do the brakemen now have to perform?

A. Have to couple the engine to the train; they have to protect the train by flagging, and have to examine the train on sidings, and know that it is safe.

Q. To what extent do they have to use the hand brake?

A. Very little; in fact, not at all in stopping the train ordinarily at stations. They have to use the hand brakes when they set cars out on the sidetrack, and if they leave the train setting

76 on the main track they have to protect it from approaching trains.

Q. With a train, under normal conditions, equipped as the act of Congress and the rules of the Interstate Commerce Commission require, with seventy-five per cent of air, is there any use on any of the roads in this State for a third brakeman on through freight trains?

A. There is not in my judgment.

Cross-examination by Mr. RHOTON:

Q. Where did you act in the capacity of freight conductor?
A. On the Illinois Central Railroad.
Q. Have you ever been a conductor in Arkansas?
A. No sir.
Q. Where were you a brakeman?
A. On the Illinois Central.
Q. Ever in Arkansas?
A. No sir.
Q. Did they have a particularly level track on the Illinois Central where you worked?
A. They had a one and one-half per cent grade and six degree curves.
Q. On what Division of the Illinois Central did you work?
A. From Chicago to Champaign, seven-tenths grade.
Q. Is it not prairie country? between Champaign and Chicago is prairie country.
A. Generally it is prairie country.
Q. And that is the only place you ever acted as freight conductor and freight brakeman?
A. Yes sir.
Q. When did you act as conductor?
A. 1884 to 1889.
Q. When did you act as brakeman on that road?
77 A. Prior to 1884.
Q. That was before the application of air brakes?
A. We only knew air brakes on passenger trains. Didn't use it on freight trains at all.
Q. From having acted as conductor of a freight train, you have no practical experience with the operation with air brakes?
A. I never ran a freight train with air brakes.
Q. Did you ever brake on a freight train with air brakes.
A. No.
Q. What do you mean by seven-tenths grade.
A. Seven-tenths of one per cent; seven-tenths of a foot in one hundred feet.
Q. What would one per cent be?
A. One foot in one hundred feet.
Q. One and a half.
A. A foot and a half in one hundred feet.
Q. The Illinois Central from Chicago to Champaign is practically straight?
A. It is practically straight, one or two curves.
Q. What road are you connected with now?
A. Missouri Pacific.
Q. Are you acquainted with the manner in which the Iron Mountain railroad crews its through freight trains in Arkansas.
A. They have three brakemen on all their freight trains in Arkansas.
Q. They have had three brakemen on all of their freight trains in Arkansas for about three years?

A. I couldn't tell you.

Q. How long have you been acquainted with their manner of crewing their freight trains?

A. Since 1905.

Q. Since you have been acquainted with it have they not
78 equip-ed their freight trains with three brakemen?

A. On certain parts of the line; didn't have on all the lines in Arkansas. I think they have three brakemen on the main line between the north Arkansas line and Texarkana, and whether they had or not when I came here between Little Rock and Louisiana State line, I don't know; but I know they didn't have a year ago, because we had to put them on.

Q. What about from here to Fort Smith?

A. They haven't had three brakemen on all trains, nor they haven't today, except in Arkansas, on the Fort Smith line.

Q. Have they not all the time had three brakemen in Arkansas on the Fort Smith trains?

A. No sir.

Q. When was it they didn't?

A. Didn't have it for about a year prior to the time this law went into effect.

Q. Had they had it up within a year prior to that time?

A. Not so far as I know.

Q. Do you know what per cent of the freight trains in Arkansas, of the Missouri Pacific freight trains, were equipped with three brakemen when this act of the legislature went into effect?

A. Well, that would be a surmise like.

Q. Now, you say that the engineer, in the operation of freight trains with air brakes is absolutely responsible for the stopping and starting of trains?

A. Yes sir.

Q. And absolutely responsible for controlling the stopping of trains?

A. Yes sir.

Q. Then the brakemen have absolutely nothing to do with that?

A. Ordinarily, I think I said.

Q. Are there occasions arising in the operation of a freight
79 train where the intervention of the brakemen is necessary either in stopping the train or starting it, or in controlling its speed?

A. In the event of a complete failure of the air pump they would be responsible for stopping it for the first side track, where we could set it out, under our practice.

Q. There is, in the operation of freight trains, at times a complete failure of the air pump?

A. Occasionally.

Q. Well, occasionally there is a complete failure?

A. Yes, occasionally.

Q. How many brakemen would it take to stop a freight train of forty or fifty cars with a ton-age of 50,000 or 60,000 per car, if they

had to do it by the use of hand brakes, the train running at ordinary speed that a freight train would run?

A. On a level track?

Q. First on a level track?

A. On a level track it would not take very long.

Q. How many brakemen would it take to stop it in a reasonable time?

A. I acted as one of two to stop such trains in my time, and we would take anywhere from a half to three quarters of a mile, or a mile and a mile and a half, to stop the train on level track with two brakemen.

Q. Three brakemen would be able to stop it quicker than two?

A. If they were properly located.

Q. So then in the operation of a freight train a third brakeman would be useful in case of an emergency? Say the air pump would fail and they would have to stop it with hand brakes?

A. As we don't know when the emergency would arise, he must at all times be located in the middle of the train, and if he always roade there, of course, at times in emergencies he would be useful.

Q. Then in all cases a third brakeman would not be useless
80 in the operation of a freight train?

A. I would not consider him so at all times.

Q. Now, if the engineer is absolutely responsible for the stopping and starting of the train, and for controlling its speed, why does the Iron Mountain have a rule that requires the brakemen to be on top of the train at least a mile before they get to a station, and on top of the train in descending and ascending grades?

A. To meet the emergencies that we have been speaking about.

Q. So then, the fact that the Iron Mountain or Missouri Pacific, in Arkansas, requires the brakemen to be on top of their train every time they go up a grade or down a grade, and every time before they get to a station a mile before getting in, indicates that in the operation of a train at any time an emergency might arise?

A. It is possible.

Q. And in these emergencies the third brakeman would not be useless, would he?

A. If he was on the middle of the train he would not; if he was on the engine or caboose he would not be of any use.

Q. Would not then, the fact that they place these brakemen on top of the train a mile before getting to a station, and on ascending and descending the grades, and the fact that three brakemen can stop the train quicker than two, shows that there is a possibility of the necessity of a third brakeman every time they go up a grade and down a grade, and every time they go into a station?

A. No sir. I won't agree with you.

Q. When there is a break in the train, or a division, accidentally or any way, but treat it as accidental; do the rules of the company require a man to stay with that rear division, right there with the division, on the train?

A. He is to secure the rear end of the train. He couldn't very well stay with it and do the flagging.

Q. Do the rules require some man to stay there with that?

81 A. No.

Q. And it does not require him to do that under any circumstances?

A. I would like to have you state the circumstances and I can answer you? There is nothing that occurs to me that would require a man to stay right there on that portion of the train.

Q. Then your opinion and your judgment is that there is no emergency or condition arises that requires a man to stay right with that rear division?

A. I don't see any necessity for it.

Q. What is the practice when a train breaks in two?

A. The practice is, when the rear of the train breaks off to secure it with hand brakes, and then protect the hind end of the train with a red lamp and then go back and flag the rear.

Q. I will ask you, if rule 369, which says that a flagman must always be left with the train if the grade is such, &c.; doesn't one man have to stay with the rear end of the train?

A. Well, he is left there, but he don't have to stay there.

Q. What I mean to get at is this: The man who goes back and flags to protect the rear end of the train could not be the man that is left in charge of the rear end of the train?

A. He is the same man.

Q. Then you mean the man that goes back to flag, that is the same man that is to stay there?

A. Yes sir. If he is on a grade he don't have to go far.

Q. About how far would he have to go back?

A. One per cent grade, 1000 or 1500 feet would be far enough to stop a train.

Q. Now, you mean this man that is to go back 1000 or 1500 feet is the man that is to take care of the rear end, in case the brakes are released?

A. I think he is.

Q. Would it not be far safer to have a man right there

82 with it and stop it rather than have a man to run one thousand feet and climb up on it and stop it?

A. Yes sir.

Q. Well, in that emergency this third brakeman would be in use if he was there?

A. If there is any danger of such a condition. If the conductor thought he was running such a risk he or the other brakeman would take care of it.

Q. Why is the company so careful about this in promulgating its rules?

A. Of course, we try to cover everything. We never figure that all men are normal; we therefore try to cover all contingencies. Some mischievious boy might release the brake or some one might do it maliciously.

Q. Might not the mechanical part become defective so it would be necessary?

A. Not with hand brakes.

Q. You mean there would be with air brakes?

A. Yes sir. He would set the hand brakes after the hind end had stopped.

Q. Who inspects the freight train when it stops at various stations and sidings to see whether or not the train is in a fit order and condition to be operated without danger of mishaps?

A. A good careful conductor and brakeman.

Q. At the station the conductor has to go to the telegraph operator and get his orders?

A. Yes sir, but he walks over it, that is, as he goes to the station.

Q. He don't walk on both sides of it, does he?

A. No sir.

Q. Do you mean to say that the conductor going from the caboose up to the telegraph office examines the boxes?

83 A. They don't unless they are hot; if they are hot you can tell it.

Q. Don't the rules say that the purposes of the examination is to see that they don't get hot?

A. No sir.

Q. In the operation of the train, to help operate it safely and speedily, is it not best for them to make such examination of the journals to see that they are in condition that they probably will not get hot?

—. You know on each car there are six boxes, and on forty cars there would be three hundred and twenty oil boxes. They are not required to do it, and it is not expected of them. When a box shows signs of being hot, and it usually does by smell first; that is the way we usually find heating of boxes.

Q. But, Mr. Higgins, the notification through the sense of smell is only from the journals that have in them dope?

A. Yes sir.

Q. Is it not a fact that in this State, on the Iron Mountain and Choctaw, half of the journals don't have dope in them, and the heating of them would only be discovered by sight?

A. For the Iron Mountain, I will say no; and I don't think it is possible for that condition to exist on any railroad.

Q. Are there not a good many wrecks and derailments caused by the journals burning off?

A. I am very pleased to say that on the Missouri Pacific and Iron Mountain Division, we have had very few.

Q. The few wrecks are the result of journals being burned off, particularly, and you have had three brakemen on your trains, have you not?

A. Some of them.

Q. I mean in Arkansas?

84 A. Yes sir, in Arkansas. In the first place we have an organization of inspectors to inspect the cars and pack those boxes, and if that is well done you have very few hot boxes, and if your train crew examine them carefully, and take care of it, you have very few hot boxes.

Q. And the more men you have to make that examination the better they can examine?

A. Two men are ample for that.

Q. Have you had experience enough in Arkansas in the operation of trains to see that two men are enough?

A. Yes sir.

Q. Have you had experience out on the road?

A. I have not in braking, but I am operating trains.

Q. Is it not a fact that a number of years ago, before the air brake equipment went into effect, and the automatic couplers, that you had inspectors at intermediate points whose duty it was to inspect these journals and look after the train?

A. No more than we have today.

Q. Do you mean that you have as many today, and have not taken off any?

A. I have not said that.

Q. In Arkansas the inspectors have been taken off at intermediate points.

A. I don't know.

Q. Assuming that the car inspectors have been taken off at these intermediate points, wouldn't their absence put greater duty on the train crew in Arkansas

A. I think not. We have no great long divisions in Arkansas; 125 miles and some longer.

(By Mr. WILLIAMS:)

Q. You have inspectors at all these terminals?

A. Yes sir; and some of the intermediate points. We have at Gurdon, I know.

Q. Have you at Newport?

A. I think so.

85 Q. And at all division points?

A. I think so.

(By Mr. RHOTON:)

Q. Suppose this condition should arise: at sidings, a flagman always has to protect the rear, does he not?

A. Always while the train is occupying the maintrack.

Q. Suppose they are running on the main track and come to a siding, one brakeman has to protect the rear; now if they are expecting a train from the other direction, some member of the crew has to protect the train from the front? Of course, they enter the station on the main track?

A. Yes sir.

Q. Then, they are to take the siding for the purpose of letting a train pass that is coming from the other direction; now, one flagman has to protect the rear?

A. Yes sir.

Q. Now, one has to protect the front, does he not? Ought they not in safety, to send somebody ahead to protect the front?

A. Yes sir.

Q. Suppose they find on that side track a number of cars—there usually is?

A. No sir, not on the Iron Mountain. We have got passing tracks on the Iron Mountain that are clear and kept clear.

Q. If you have a man out protecting the front and one protecting the rear, and they have to back in and protect streets and roads, have you not use for a third brakeman to do it?

A. If I understand your case, an inferior train has to come to a station and take the siding for a superior train; they have got to clear the main track five minutes before time for the superior train; the head brakeman goes ahead and throws the switch, and the stop they make is only long enough to throw that switch, so there is no occasion for the rear brakeman to go back to flag if they pull in at once.

86 Q. Suppose they are not clearing by rule, ought he to go ahead and flag?

A. You will have to cite circumstances; our rule is too clear.

Q. Take the circumstances of the wreck that occurred on the Valley Road at Higgins; the freight train left here with an order to clear at Higgins; they broke down on Fourche, so that they got to Higgins and couldn't clear by rule; when they got there and stopped there, one flagman had to go back and protect the rear, didn't he?

A. Do you want me to assume that your statement is a fact?

Q. Yes sir.

A. I want to say first, from our evidence, it is not.

Q. Assuming it to be a fact, one had to go back and protect the rear?

A. If it stopped on the main line he had to go back and protect the rear between stations.

Q. And one had to go ahead and protect the front?

A. Yes sir.

Q. If one is in the rear and one in front, who is there to protect the engine, and throw the switch and give signals?

A. Taking your statement, as the head brakeman went by the switch, the brakeman would stop and open the switch. You can't make rules for incompetent and careless men. Our information is that they didn't have time to make Higgins, and they didn't stop between here and there, and why they didn't get in there I don't know. They had three brakemen on that train and the thing happened.

Redirect examination by Mr. WILLIAMS:

Q. Now, Mr. Higgins, they had three brakemen on that train that was wrecked at Higgins?

A. Yes sir.

Q. Now, you spoke of occasions when there is a failure of air. I will ask you if, operating under the federal statute, if there

87 is anything the matter with your air which makes it a total failure, do you run any further than the first siding?

A. We don't under the operation; clear the first siding.

Q. In case of these emergencies you have been talking about—when there are occasional emergencies, when you find use for three

brakemen; I will ask you if occasions don't arise in emergencies when you would need as many as 10 men?

A. Yes sir.

Q. Is it regarded as good railroading that you carry a crew of men along for emergencies?

A. No sir.

Q. And in these emergencies that you speak of, might make a half a dozen useful?

A. Yes sir.

Q. But they are not the emergencies in the operation of the trains you take care of?

A. No sir.

Q. You were asked about the running of your trains up grade and stopping at stations; all of your trains have brakemen on them who would come under the operation of that rule?

A. All through trains, and have three brakemen on local trains.

Q. Why do you have three brakemen on local and not on through trains?

A. To facilitate switching and loading and unloading freight, and we regard a third brakeman as useful where there is a good deal of station work done, but it is wholly in the station work that he is useful, not to stop and start the trains on the road.

Q. On the Iron Mountain road, can you tell the court why three brakemen are kept on the trains, where they are kept?

A. We took off a number of brakemen in Arkansas, as well as other portions of the line, over a year ago, and received, naturally, a protest from the men; from their organization. We had a prolonged conference with the committee of the men, and Mr.
88 Garrison and Mr. Morrisey—Mr. Morrisey is the Grand Master of the Brotherhood of Railroad Trainmen, and Mr. Garrison, I think, is Chief Commissioner of the O. R. C.—and the negotiations are still pending.

Q. Are they kept in service because the road regards them as necessary for the operation of its trains?

A. No sir; they are kept in service for the reason that in the negotiations with the men we didn't care to have trouble over it, and it was threatened. Our President and Vice-President were in Europe at the time, and we were not in position to press the matter to the extent we otherwise might have, and since the law was passed we consider it wise to endure the hardship until such time as the courts can pass on the question.

Q. As an operating official, do you regard them as necessary to the management of these trains?

A. No sir.

Q. As Assistant General Manager, you are an operating official?

A. Yes sir.

Recross-examination by Mr. RHOTON:

Q. When was it you had these negotiations with this organization of which you speak?

A. I think in July, 1906.

Q. And that was about the time that you had taken some men off?

A. Yes sir, we had taken some of them off.

Q. When did this act requiring you to have the air brakes and automatic couplers go into effect?

A. My recollection dates back to about 1893.

Q. You mean 1903?

A. No sir, 1893.

Q. I mean when the act became effective?

A. Well, as fast as they could get them. Of course, it was a big undertaking to put them on.

89 Q. Didn't it, as early as August, 1900, require them to have seventy-five per cent air?

A. I couldn't say.

Q. 1893 the act was passed, was it not?

A. That is my recollection.

Q. They were given seven years and seven months to get it into effect

A. Yes sir.

Q. That would have been in 1900. So then, after you were required to put on air, from 1900 until 1906, you kept three brakemen?

A. That is my understanding.

Q. They didn't attempt to take them off until 1906?

A. On some portions of the road.

Redirect examination:

Q. The Interstate Commerce Commission was given the power to extend this act from time to time, and did extend it from time to time?

A. Yes sir, I know they did do it, from time to time.

Q. And after that time they increased the order to seventy-five per cent?

A. Yes sir.

Q. And that took effect a short time ago?

A. Yes sir, on this road.

Q. As an operating official of the Iron Mountain, do your duties require you to be familiar with the operation of trains in Arkansas?

A. That is all I have to do. I am only responsible for transportation on this road.

90 *Testimony of J. W. Maxwell.*

J. W. MAXWELL, being called by defendant, and first duly sworn, testified as follows:

Q. Mr. Maxwell, what is your business?

A. I am General Superintendent of the St. Louis Southwestern Railway Company.

Q. Does that line operate in Arkansas?

A. Yes sir.

Q. From what points to what points?

A. From—I think the name of the station where it crosses the

line between Arkansas and Missouri is Campbell, or about St. Francis, and from there to Texarkana, on the main line.

Q. How long have you been in the railroad business?

A. Forty years.

Q. In what capacity?

A. Messenger, operator, dispatcher, chief dispatcher, train master, superintendent, general superintendent, and assistant general manager.

Q. In that work, did any of those positions place you in direct connection with the operation of trains?

A. Yes sir.

Q. And the employment and duties of train crews in connection with those trains?

A. Yes sir.

Q. On what roads besides the Cotton Belt have you been employed?

A. Pennsylvania; Missouri Pacific; Missouri, Kansas & Texas; Iron Mountain; Wabash; St. Louis Southwestern.

Q. Now, Mr. Maxwell, you have heard the testimony of these other witnesses, will you state to the court what use, in the operation of through freight trains there would be for a third brakeman?

A. I don't think there would be any use for them; don't regard them as necessary.

91 Q. Do you know the general practice of railroads in the southwest in reference to using two or three brakemen on through freight trains?

A. I knew the practice of a great many.

Q. What is it?

A. They have only two freight brakemen on through freight service, except the Missouri Pacific—Iron Mountain System; they are the only ones that I know of that has three.

Q. How long have you been with the St. Louis Southwestern Railway Company?

A. Seven months.

Q. What road were you with before that?

A. Missouri, Kansas & Texas.

Q. How many brakemen did they use on through freight trains?

A. Two.

Q. Have you found, in your experience, that a train equipped with two brakemen, and the other employés—engineer, fireman and conductor—that those employés are competent and sufficient to handle the train?

A. Yes sir.

Cross-examination by Mr. RHOTON:

Q. Did you ever act as a freight conductor?

A. No sir.

Q. Ever act as a brakeman?

A. No sir.

Q. Did this road that you were with just before you came to the Cotton Belt have three brakemen on any of its trains?

A. On some of its local trains, part of the year.
Q. Did it equip its local trains with air brakes?
A. Yes sir.
Q. Has the same equipment on them that it has on the others, has it?
92 A. Yes sir.
Q. Does the Cotton Belt, on any of its local trains, have three brakemen?
A. Yes sir.
Q. Has it those trains equipped with air brakes?
A. Yes sir.
Q. About how many cars on the local trains; about what is the average number of cars you haul on the Cotton Belt?
A. Well, I don't know that I can answer that question correctly. North of Pine Bluff they can haul from 40 to 60 cars, and south of Pine Bluff from twenty to thirty, where the grades are heavier.
Q. And on those they have three brakemen?
A. Yes sir.
Q. Are you acquainted with the number of brakemen the Rock Island uses on its local freight trains?
A. No sir.
Q. That part of the Missouri Pacific in Arkansas, you say they use three brakemen on through freight trains, and on local freight trains?
A. That is my information.
Q. And that has been true for fifteen years as you know?
A. Yes sir.
Q. The Iron Mountain has more mileage in Arkansas than any other railroad system, has it not?
A. I expect it has.
Q. Well, is there anything between the nature of the country through which the Iron Mountain operates its trains on account of grades or curves—any different from the Rock Island? Would not the necessity for three brakemen on one road be as great as on the other?
A. So far as I know.
Q. Do you know of any distinction?
A. I don't know of any.
93 Q. Would you say in the operation of freight trains, emergencies do not arise where it would be safer and better than to have only two?
A. I don't think so.
Q. Then, you don't believe that any emergency would arise where a third brakeman could be of any use at all?
A. There could be emergencies that a third brakeman could be used, but I don't know of any emergency where he would be necessary.
Q. An emergency might arise where he could be used to some advantage in stopping a train?
A. No, I don't agree with that.

Q. Who is responsible on the Cotton Belt for stopping and starting the trains and controlling the speed?
A. The engineer.
Q. Have the brakemen anything to do with that?
A. No sir.
Q. Never?
A. No, not in the ordinary and normal operation of the train, and running trains.
Q. Don't your rule require the brakemen to be on top of the freight trains at certain times and places?
A. Yes sir, the rules require that.
Q. What duty can the brakeman do on top of the train except in stopping and starting trains?
A. He can be there in cases of emergencies.
Q. Can he perform any other duty?
A. Yes sir; he can pass signals from the rear to the front end of the train. He is put on top of the train for that purpose very frequently.
Q. How often do the rules require the engineer to test his air brakes to see if they are in good working order?
94 A. Test them before they leave the terminal stations, and test them after starting—make slight application, to see if they are working—and test them after they break the train to set out cars; after the train is coupled up they test them again.
Q. Don't the rules require an engineer to test the air before starting up a grade and before starting down a grade?
A. No.
Q. And test it before he gets to a station?
A. No sir, an engineer knows whether his air is working or not. He is supposed to know when he is approaching a station, and a careful engineer does know.
Q. Does it not require him to test it before he starts up a grade, so if it is out of order he can signal the brakemen to be on top in case of necessity?
A. No sir.

Redirect examination:

Q. What is the purpose of the Cotton Belt in having three brakemen on local freight trains?
A. To assist in loading and unloading freight in less than car load lots and assist in switching. These trains do all switching at stations, and industrial plants. A local crew is a traveling switch engine.
Q. Then they are not provided for the safety of either the train or the employés?
A. No sir, it is to assist in the physical labor of loading and unloading freight and switching at stations.

Recross-examination by Mr. RHOTON:

Q. Now, Mr. Maxwell, you say that it is necessary sometimes to have the train men on top of the train to give the signals?

A. Yes sir.

95 Now, how far—how many car length- can a signal be seen during foggy weather, or where the fogs are on the track, as they frequently are on the Cotton Belt and low sections in the State?

A. I don't know; I have never been in a fog on the Cotton Belt in this State, but I suppose it is about the same as in any other State. It would depend on the density of the fog.

Q. Say ordinary density?

A. Maybe not more than forty feet.

Q. Could the signals not be given better with three men than two?

A. No. It might be done a little more rapidly if you had a line of men. Two men have been ample in all my experience.

Q. You have never had any experience as conductor or brakeman?

A. No sir, but have been on trains in fogs.

96 *Testimony of E. A. Peck.*

E. A. PECK, being called by defendant, and first duly sworn testified as follows:

Q. Mr. Peck, what is your business?

A. Superintendent of the St. Louis Southwestern Railway Company.

Q. How long have you been in the railroad business?

A. Over thirty years.

Q. In what capacities have you served?

A. Operator, agent, trick dispatcher, chief dispatcher, trainmaster, superintendent, and general superintendent.

Q. With what roads?

A. Cleveland, Cincinnati, Chicago & St. Louis; St. Louis, Iron Mountain & Southern; St. Louis Southwestern.

Q. Are you familiar with the operation of freight trains and with the duties of the train crews in running through freight trains?

A. Yes sir.

Q. And the purposes they serve on those trains?

A. Yes sir.

Q. Are you familiar with those things in the operation of trains in Arkansas?

A. Yes sir.

Q. For how long have you been connected with roads operating in Arkansas?

A. I have lived in Arkansas six years, and have been connected with roads through Arkansas for sixteen years.

Q. How are trains on the Cotton Belt road, and on roads with which you have been connected manned with reference to brakemen on through freight trains?

A. We have a conductor and two brakemen on our through freight trains.

Q. Have you found that they are sufficient for the oper-
97 ation of those trains?
A. Yes sir.
Q. Is there any necessity or any reason for the employment of another brakeman to operate those trains?
A. No sir.

Cross-examination by Mr. RHOTON:

Q. You never have acted as a freight conductor, have you, or brakeman?
A. No sir.
Q. You say you are now connected with the St. Louis Southwestern Railway Company?
A. Yes sir.

98 *Testimony of W. W. O'Gline.*

W. W. O'GLINE, a witness for defendant, being first duly sworn, testified as follows:

Q. Mr. O'Gline, what is your business?
A. Road Foreman of Equipment on the Rock Island Railway.
Q. What are your duties as Road Foreman of Equipment?
A. To look after the operation of engines and trains services—engineers and firemen.
Q. How long have you occupied that position?
A. Have been in that position about a month.
Q. How long have you been in the railroad business altogether?
A. About twenty-three years.
Q. In what capacities have you served during that time?
A. I started in as call boy, and from that to brakeman, and firing and running locomotives.
Q. With what roads have you been connected?
A. Pennsylvania; Baltimore and Ohio; and Rock Island.
Q. How long have you been with the Chicago, Rock Island & Pacific Railway Company?
A. Went to work for them six years ago the first of last June, at Trenton, Missouri, as locomotive engineer.
Q. What kind of trains did you handle?
A. Freight.
Q. Now, Mr. O'Gline, on the trains of which you have been engineer how many brakemen have been used on through freight trains?
A. Two.
Q. What has been the size of those trains, generally? That is in Missouri, I understand you used to operate?
A. Yes sir. Well, they run from anywhere to twenty to sixty five cars.
Q. In your experience, have those two brakemen been sufficient to properly handle those trains?
99 A. They have, at all times.
Q. Have you found any occasion during that time in which a third brakeman has been necessary?

A. No sir.

Q. I believe you stated that you have charge of the operation of the engines and enginemen on the Chicago, Rock Island and Pacific?

A. Yes sir.

Q. Now, have you the rules governing them in the operation of the engine and freight trains?

A. Yes sir.

Q. Now, under those rules, whose duty is it to handle the brakes?

A. The engineer's.

Q. Have you those rules with you?

A. I have got the book of train rules.

Q. I mean the rules in reference to the handling of brakes?

A. We have a mechanical book of rules.

Q. (Book handed witness.) Will you turn to that rule for engineers in reference to the handling of brakes? (Rule 36 page 23) Read, will you, the rule in reference to the handling of brakes.

A. Yes sir: "36. Hand brakes should not be used on cars having cut in air, except in emergency, but must be on cars left in sidetracks. When a part air train is being backed the hand brakes should be used on rear to prevent train parting. Air brakes must not be depended upon for holding trains or engines while standing.

"36*a*. All ordinary braking shall be done by the engineman and hand brakes used only in emergency or in the event of air-brakes failure."

Q. Now, Mr. O'Gline, since you have been in Arkansas, have you been observing the trains and the handling of freight trains so as to be familiar with them?

A. Yes sir.

Q. Have you found any necessity existing for the use or the employment of a third brakeman on through freight trains?

A. I have not.

100 Cross-examination by Mr. RHOTON:

Q. On what part of the Baltimore and Ohio did you work?

A. Cleveland, Loraine and Wheeling Branch, and on the Pennsylvania between Pittsburgh and Cressline. I fired there eight years and left the service in 1891.

—. On some parts of those systems they used three brakemen?

A. Not while I was there.

Q. Do you know that they don't use them now?

A. I couldn't say as to that, because I have not been with the Pennsylvania since I quit there.

Q. You say you were on the Pennsylvania between Pittsburgh and Cressline?

A. Yes sir.

Q. You say they didn't use three brakemen on any of their freight trains at that time?

A. No sir: On the local they did.

Q. You never performed the duties of freight conductor in Arkansas, did you?

A. No sir.

Q. It says here that hand brakes should not be used except in emergencies. What emergencies does it refer to?

A. My interpretation of that is, in case the air brakes fail, to control your train with hand brakes to the first side track to get it in the clear.

Q. During that interval it would have to be controlled by the hand brakes?

A. Yes sir.

Q. Do the brakemen have anything to do with stopping the trains at stations?

A. Under normal conditions?

Q. Yes sir?

101 A. No sir.

Q. On descending grades?

A. No sir.

Q. In addition to the rules that the Chicago, Rock Island and Pacific has for its engineers, it also has rules for its brakemen, doesn't it?

A. Yes sir.

Q. (Book shown witness.) Do you recognize this as the book of rules on the Chicago, Rock Island and Pacific Railway for the brakemen?

A. Yes sir.

Q. This rule is in the hands of your brakemen for their guidance, is it not: "Brakemen must stop their trains at stations and control them in descending heavy grades without waiting for a signal from the engineman, and must be careful to avoid the sliding or heating of the wheels?

A. There has been a book of rules issued since that.

Q. But that is in the hands of the brakemen now, is it not?

A. I think that is true.

Q. They say the engineer must control it, and say to the brakemen that he must control it?

A. That rule says so.

Q. How can the brakemen control the train other than by the hand brakes? I mean assist in it?

A. I will say to you that he can't control the government of the train when you have got air brakes operating.

Q. How could he control it, or assist in controlling it without using the hand brakes?

A. He couldn't.

Q. If they do what this rule requires them to do, they must handle the hand brakes, must they not, in going into stations?

102 A. Well, then can't handle them when you are handling the air.

Q. If they comply with this rule they must use them, must they not?

A. Yes sir, if they comply with that rule.

Q. And this rule is in their hands now to govern their actions? is it not?

A. That rule is in their possession.

Q. Are you quite sure that they can't set a hand brake when the air brake is acting?
A. They can set a hand brake when the hand brake is acting.
Q. In other words, the brakeman could so handle their hand brakes so as to make the hand brakes co-operate with the air brakes in handling the train?
A. No sir.
Q. What do you mean?
A. Assuming you have got a train equipped with air; it is in the control of the engineer, and any brakes that are set by hand takes it out of the hands of the engineer, so that it is necessary——
Q. So the Rock Island has a rule that is unnecessary, in the hands of the brakemen?
A. Subsequent rules provide for that.
Q. Is that subsequent rule now in the hands of the brakemen?
A. Yes sir.

103 *Testimony of J. J. Sneddiker.*

J. E. SNEDDIKER, a witness for defendant, being first duly sworn, testified as follows:

Q. What is your business, Mr. Sneddiker?
A. Superintendent of the Missouri Pacific Railway at the present time, located at Coffeyville, Kansas, in charge of the Southern Kansas Division.
Q. How far does the division extend this way?
A. Not south of Coffeyville.
Q. How long have you been in the railroad service?
A. Since August, 1885.
Q. What different positions have you worked in?
A. Brakeman, conductor, train master and superintendent?
Q. Have you been a freight conductor?
A. Yes sir.
Q. How long did you serve in that capacity?
A. I served from June 8th, 1888, until November 10th, 1903.
Q. That is as conductor?
A. Yes sir.
Q. Your experience as conductor covers quite a few years?
A. Yes sir.
Q. Had you been, prior to that time, a brakeman?
A. Yes sir.
Q. Were you familiar with the operation of freight trains prior to their equipment with modern appliances, of air brakes and safety appliances under the act of Congress?
A. Yes sir.
Q. Have you been familiar with them since that time?
A. Yes sir.
Q. What were the duties of brakemen on freight trains prior to the modern facilities?

A. The rear brakeman looks after the supplies in the ca-
104 boose; helped stop trains at stations and water tanks and everywhere the engineer would whistle for brakes and does the flagging.

Q. How many brakemen was customary at that time to use on through freight trains.

A. The first train I was on, brakeman, there was two men used there, and after that, on the Missouri Pacific, there were three brakemen.

Q. When you were operating with two brakemen, how many cars did you have?

A. Had about twenty loads.

Q. Have any trouble handling the trains with two brakemen?

A. No sir.

Q. You were conductor after that; how many brakemen did you have?

A. Three.

Q. Is there any difference under these modern facilities, in the brakemen handling trains? Does it make any difference in the facilities for handling the trains?

A. Yes sir. I consider that two brakemen on through freight trains is enough to handle the train.

Q. I will ask you, is that from your experience as a brakeman and a conductor?

A. Yes sir.

Q. In your opinion, from your experience, two brakemen is enough on through freight trains of the size and ton-age and present equipment?

A. Yes sir, I think so.

Q. Is there any necessity for a third brakeman?

A. Not in my opinion.

Cross-examination by Mr. RHOTON:

Q. You say, that applying the air brakes—equipping the
105 trains with air brakes—makes it easier for the brakemen?

A. Oh, yes, much easier.

Q. It makes it so that they don't have to do any braking at all, does it?

A. Not under ordinary circumstances, in stopping a train, in making the stops at stations and water tanks and coal chutes.

Q. They don't have to use the brakes as often as they used to?

A. No.

Q. But, is it not a fact, that when the air gives out, if it gives out, that they would be needed just as much as ever?

A. We don't handle a train after the air gives out only to get to the first siding.

Q. Well, you would need them?

A. If anything would break, the pump breaks, or anything, the air would stop it; it stops the train right then and there if it breaks.

Q. What would be the necessity of brakes at all?

A. Descending a grade five or six miles long, say middle way

of that grade the pump would break, it would stop the train? As quick as it was ascertained what was the matter they would set the hand brakes and bleed the car, that is, let the air out. You would set the brakes enough while the train was standing to hold it, and you would have enough brakes set to handle the train until you would get down to the siding.

Q. And when it was bled, it would be like a train without any air brakes at all?

A. Yes sir; and take it down to a siding, maybe fifteen or sixteen miles out.

Q. Now, on these new trains they have from fifty to sixty cars?

A. Yes sir, some of them.

Q. In that kind of a case you would have to handle the train by hand brakes only?

106 A. Yes sir.

Q. Now, when they had the old system of fifteen or twenty cars, they found it necessary to have two brakemen to handle the train?

A. Yes sir.

Q. If it was necessary to have two brakemen under the old system with fifteen or twenty cars, why would it not be necessary to have more than two brakemen to operate that train with fifty or sixty cars; how can you say that two brakemen would be sufficient?

A. It would be sufficient to operate the train down to the next siding.

Q. Operate a train like that, with the air brake broke?

A. Yes sir, to the next siding.

Q. Wouldn't three brakemen be safer?

A. Would not be any safer, because the brakes would be set before you started down; they would have it under control, and if you have three probably the third man would never get out of the caboose.

Q. When your air gives out and the train gives out, your rear man has got to go back and flag the train?

A. Yes sir. I have been right in this same kind of a fix, and one man can handle this train to get down to the siding.

Q. How long did you act as freight conductor?

A. From June, 1888, to November, 1903.

Q. During all that time, did you have three brakemen?

A. Yes sir; I was on the Missouri Pacific.

Q. Did you ever operate a freight train with less than three brakemen?

A. Yes sir, occasionally, but not regularly.

Q. You were conductor up to what time?

A. November 10th, 1903.

Q. Now, suppose that instead of having your air give out going down grade, it would give out going up grade, then the air

107 brakes would be set, as I understand?

A. Yes sir.

Q. Then they would apply the hand brakes, and then they would bleed the train?

A. Yes sir.

Q. Now, they are going up the grade and have to get up and go down the other way?

A. Yes sir.

Q. Would you not have to control your train going down the other way?

A. Yes sir. You would not wait until you tipped over the hill; you would begin to set your brakes before you tipped over it.

Q. I believe you said awhile ago that one brakeman could govern your brakes too?

A. Yes, one man could control it; I have been in that condition going up and down grade both.

Q. And the second man would be absolutely useless?

A. No sir, I didn't say that; but I am talking about what one man can do.

Q. Where were you conductor on the Missouri Pacific?

A. Between Kansas City and Sadalia; a very hilly line.

Q. Where is the conductor's place on the train?

A. It would depend on the conditions. If you are going to meet a superior train at a station, at the front end of the train.

Q. Where is the brakemen's place?

A. Head brakeman at the front end of the train on top of the cars, and the rear brakeman at the rear end of the train on top, when coming to stations. The head brakeman has to be at the front end of the train, on the second or third car from the head end.

Q. If the train would part, only one man would be at the rear end, and that would be the rear brakeman, to control it?

108 A. It would stop itself.

Q. He would have to go back and protect the rear end of the train?

A. If he is standing on the main line he would.

Q. That would leave that standing there without protection?

Q. It can't get away from you; your air is set on the front, and you can't get five car lengths.

Q. The act of Congress requires seventy-five per cent equipped with air brakes; say you have got sixty cars, that would be forty-five cars with air brakes?

A. Yes sir.

Q. The cars without air are in the rear?

A. Yes sir.

Q. If the fourteenth car from the rear breaks in two, then the rear brakeman would have to stop that, would he not?

A. Yes sir.

Q. Now, your front brakeman would be on the forty-five cars, would he not?

A. Yes sir.

Q. And the rear brakeman would be on the back end, and would have to stop that?

A. Yes sir.

Q. And also have to go back and protect the rear end?

A. Not until he stopped the cars.

Q. Would it be safe to leave it then?

A. If it is stopped.

Q. When you stop, is it not his duty to protect it immediately?

A. Yes sir.

Q. Would it not be much safer to have three brakemen in a case like that?

A. If the middle brakeman is assigned where he would be on the train, he would be ahead of the break, and would not be
109 where he could help the rear man that way.

Q. In view of the fact that you have got the cars without air brakes in the rear, would it not be a good rule to have two brakemen there—better and safer in the operation of the train?

A. Of course, if there was a train following it, and you knew where the train was going to break, and all that, it would be better and safer to have two men there.

Q. Don't you figure that there is always a train coming behind?

A. We act on that presumption. You will not handle two cases of break in two the same; your conditions will govern you. You might be in a position, if there was a flagman, train going down a grade, and a train following ten minutes behind, to drift it down and go further.

Q. Would it not be better to have a man there to control the speed, and another one to flag?

A. It might be.

Q. It would be better to have one man there to stop the train, and one man to go back?

A. Yes, in that case.

Q. And that could be provided better with three brakemen than two?

A. It could be in that case.

Redirect examination:

Q. In the operation of freight trains, do you ever put two brakemen on the rear end of the train?

A. No sir.

Q. Where is the third brakeman assigned?

A. In the middle of the train.

Q. That is the rule all over the Missouri Pacific, and that is the orders?

A. Yes sir.

110 Q. So, under the case put, that would not help the conditions?

A. No sir.

Q. You would have to put the third brakeman back of where there was air?

A. Yes sir.

Q. Where a brakeman is out behind flag-ing, and he is called in, don't they use torpedoes or fusees?

A. Yes sir, torpedoes in day time and fusees at night.

Q. So he could go back to the train?

A. Yes sir.

Q. And he could go back to the train and the train would still be protected?
A. Yes sir.

Recross-examination by Mr. RHOTON:

Q. What is a fusee?
A. It is a red light that burns about 10 or 11 minutes.
Q. Do you mean that he would go out there and light that fusee and leave it and go back to the train and take chances on the other train running into that train?
A. Not until he would be called in.
Q. When he is called in, is it not important to start as quick as possible, after calling the flagman in?
A. Yes sir. As I said before, you will hardly have two break in twos just the same, and where the occasion and conditions are the same. I can't imagine any condition in Arkansas where you would want three brakemen on through freight trains.

111 *Testimony of A. E. Walker.*

A. E. WALKER, a witness for defendant, being first duly sworn, testified as follows:

Q. Where do you live, Mr. Walker?
A. Trenton, Missouri.
Q. What is your business?
A. Train Master for the Chicago, Rock Island & Pacific Railway Company.
Q. How long have you been in the railroad business?
A. Twenty years.
Q. With what roads?
A. With the Rock Island all the time.
Q. What positions have you held with the Rock Island?
A. I was first in the civil engineer corps, and brakeman on train three years, and for sixteen years run freight train and passenger train.
Q. On what part of the Rock Island did you run?
A. Colorado Division, Nebraska Division, Kansas Division, and El Paso Division.
Q. How many brakemen did you have in the operation of freight trains?
A. Two brakemen on through freight trains and quite a number of our locals.
Q. Did you ever run with three brakemen on freight trains?
A. Never.
Q. How many cars did you handle on those through freight trains?
A. From McFarland to Kansas City from forty to forty-five, of loads and about sixty empties.
Q. Did you find, in your experience, that two brakemen were sufficient to handle those trains?
A. Yes sir.

Q. Did you ever find it necessary to have three brakemen?
112 A. No sir.
Q. Were you conductor before the introduction of automatic couplers and air brakes?
A. Yes sir.
Q. How many brakemen did you have then?
A. Two.
Q. Did you find it convenient to operate the train with two brakemen?
A. Never had any trouble at all.
Q. And the same way afterwards?
A. Yes sir.

Cross-examination by Mr. RHOTON:

Q. You speak of McFarland to Kansas City?
A. Yes sir.
Q. Is that where you acted as conductor?
A. Yes sir, and brakeman.
Q. Did you ever act as conductor anywhere else?
A. No sir.
Q. That is in Kansas, is it?
A. Yes sir.
Q. You speak or forty or forty-five loads?
A. Yes sir.
Q. And sixty empties to a train?
A. Yes sir.
Q. You never had any experience in Arkansas as a conductor or brakeman, handling trains?
A. No sir.
Q. Is the road from McFarland to Kansas City a straight road?
A. No sir, curved.
Q. To what extent is it curved?
113 A. You might say a continuation of curves from McFarland to Kansas City.
Q. You say that on some of the locals there are three brakemen?
A. Yes sir, some of them.
Q. Were they equipped with air brakes?
A. Not all the time.
Q. Did they have air brakes on the freight trains you were running?
A. They did the last few years I was there.

Redirect examination:

Q. Mr. Walker, I don't understand that between McFarland and Kansas City was the only place you have operated freight trains?
A. No sir.
Q. What other places?
A. Colorado Division, was the first braking, laying track and surfacing. I did the front braking, and the grade was better than one per cent and they had a few grades about one and one half, and on

the Nebraska Division; that had about one per cent. In Nebraska and Colorado it was very hilly and we only used two brakemen.

Recross-examination by Mr. RHOTON:

Q. You say in the operation of freight trains no emergencies arise where a third brakeman is useful?

A. I have never had any occasion for it.

Q. Do you say an emergency couldn't arise where he would be useful?

A. As I stated before, if he was in the proper place, he could be.

Q. Couldn't railway companies employ third brakemen and place them on the train where they would be useful to them?

A. If they knew where to place them there might be emergencies arise where they could be of some use.

114 *Testimony of W. T. Tyler.*

W. T. TYLER, being first duly sworn, testified, on behalf of defendant, as follows:

Q. What is your business, Mr. Tyler?

A. General Superintendent of the Second District of the San Francisco Railway.

Q. How long have you been in the railroad business?

A. Since about 1884.

Q. In what capacities have you worked?

A. Been employed in the capacity of messenger, telegraph operator, dispatcher, brakeman, conductor, switchman, yard master, train master, assistant superintendent, superintendent and general superintendent.

Q. On what roads have you worked?

A. On the Wisconsin Central; Milwaukee; Lakeshore & Western; Northern Pacific; Great Northern; Iron Mountain and Frisco.

Q. How long have you been engaged in the railroad business in Arkansas?

A. About seven years; I came to Arkansas about seven years ago.

Q. Are you familiar with the conditions surrounding the operation of railroads in the Southwestern States, Missouri, Arkansas, Kansas, Texas and Oklahoma?

A. Yes sir.

Q. How are the conditions of the operations in Arkansas as compared to those of other States? Is there any material difference in the operation in the States?

A. No sir, I don't consider that there are any differences in the conditions at all. The conditions in Arkansas, I think, considering all the mileage in Arkansas, would be rather favorable, because most of the mileage in Arkansas, being more level than in other States that you have mentioned; for instance, in Missouri. A great part of Missouri is heavy grades and rough curvature. That is
115 true of Oklahoma too, although it is a good deal of prairie there.

Q. From your statement you have operated in nearly all stations in railroad service up to general superintendent?

A. Yes sir.

Q. In your opinion, is the employment of three brakemen on through freight trains necessary to the safe and practicable operation of through freight trains?

A. No, I should say not.

Q. And I might add, on freight trains having more than twenty-five cars?

A. No sir.

Cross-examination by Mr. RHOTON:

Q. How long were you with the Iron Mountain, Mr. Tyler, here in Arkansas?

A. Approximately five years.

Q. Covering what period?

A. From 1900 to December 1st, 1905.

Q. During that time how many brakemen did the Iron Mountain have and use on its through freight trains?

A. Three brakemen.

Q. On both local and through freight trains?

A. Yes sir.

Q. You say that the employment of the third brakeman is not necessary, do you mean by that that neither in the ordinary operation of freight trains or in any emergency that may arise in the operation of the train, that there is no time that a third brakeman could contribute to the safety of the crew and of the public in any degree?

A. No sir, I don't regard that there is any time that the third brakeman could contribute to the safety of the crew and that
116 train in any manner whatever, if the other two brakemen and the conductor are performing their duties.

Q. Could not be some place on the train where they could be of use to the service of the train?

A. There might be some emergencies where a third brakeman might be placed so he could contribute to the safety of the train.

Q. He could contribute to the safety of the train?

A. Yes sir; in the same way that if the superintendent was on the train he might be of service by giving good advice to the conductor.

Q. In the operation of freight trains, ordinarily in meeting a superior train, don't the rules require the conductor to ride near the front of the train?

A. I don't know of any road that has any such rule. The matter of where he will ride is largely a matter of his own judgment. If he is meeting a passenger train at a station at which that train stops, and there is another train following him, he would be very likely to remain on the rear end of his train, because there would be a greater likelihood of his being needed there. If the passenger train don't stop at the station where he is meeting it, and it was just an ordinary case, he might go to the head end of the train, or to the middle of the train; but, ordinarily, he would remain at the rear end of the train. The engineer is on the head end of the train and is equally respon-

sible with the conductor, and he is expected to be in on the siding and clear five minutes before the passenger train is to be there. If he is complying with the rules he will be there, and if he is not he will tell the head brakeman as soon as he throws the switch to go up and flag the passenger train? He is responsible as much as the conductor is.

Q. If he can't make it, is it his duty or the conductor's to stop the train and protect it?

A. They are jointly responsible.

117 Q. You say you are with the Frisco now?

A. Yes sir.

Q. Do they use two or three brakemen on through freight trains?

A. Two brakemen.

Q. Now?

A. Yes sir.

Q. How many cars does the ordinary freight train in Arkansas on the Frisco now handle?

A. That varies considerable with the power. For instance, that portion of the Frisco through Fort Smith, which is the mountainous part of the line, we handle about from twelve to fifteen cars. We have the same power that they had twelve or fifteen years ago. And on the line between Thayer and Memphis, the track is comparatively level; we have in service there the same engines they had twenty years ago; they haul about twenty cars. They tell me they used to haul about thirty-five cars. We are getting new engines there now of larger capacity, and haul some now forty and forty-five cars. And the third district, with which I am connected, they haul about forty-five cars; that is in this State, part of it.

Redirect examination.

Q. Do you know why the Iron Mountain used three brakemen?

A. Of course, I can't say at this time. I have not been connected with the Iron Mountain for two years, or about it. But during the time I was with the Iron Mountain, the matter of taking off the third brakeman was considered. The third brakeman was considered entirely unnecessary, and I have in mind one or two cases where he was regarded as a menace. The matter was considered, but from matters stated between the orders at meetings, it was deemed not desirable to get into any trouble with the organization and it was thought better to let it go along as it was then; but as I say, they were not considered necessary and it was very much desired

118 to do away with the third brakeman. I have never known any road except the Iron Mountain to use three brakemen on through freight trains.

Q. Do you know as a matter of fact that the third brakeman on the Iron Mountain was put on as a wood passer when they burned wood in the engines?

A. Yes sir. That is what is told me, and as covered by the correspondence. At the time of the wood burning the third man was put on for the purpose of putting on wood.

Q. Are you familiar with the character of the Rock Island railroad from Little Rock to Hopefield?

A. Yes sir.

Q. Is that level or hilly country?

A. It is very level; very little grade.

Q. What kind of track is it from Hopefield to Memphis?

A. I consider it a level and straight track. There is very little curvature and nearly level.

Recross-examination by Mr. RHOTON:

Q. How is the line from here west?

A. I have never been over that line.

Q. When did the wood go out of use?

A. I don't know; I was not here.

Q. You say there was a protest against taking off this third brakeman?

A. Yes sir: that matter was mentioned several times.

Q. Now, how long was it after the wood passer went out of existence before this protest?

A. I don't know.

Q. What reason was given then that the third brakeman should be taken off?

A. I don't know what reason was given. You know that applied to the entire Missouri Pacific system?

119 Q. Does the Missouri Pacific use three brakemen on the rest of its system outside of Arkansas?

A. I don't know now; they did at the time I was with them.

Redirect examination:

Q. Mr. Tyler, in the Iron Mountain use of three brakemen, where were those brakemen supposed to be stationed on the train?

A. There was no rule, as I recollect, as to where they would be stationed. The understanding, I believe, was that the head man would be at the head of the train, and the middle brakeman in the middle of the train, or nearly so, and the rear brakeman on the rear of the train. It was generally the case, however, that the two rear brakemen were in the caboose and the front brakeman in the engine. When they begun equipping the trains with air brakes, it was very slow; say a train would have from six to eight air cars, and then ten or twelve, and then to say twenty, and during that time there was considerable danger of trains breaking in two, being practically equipped with air; that is, less than half equipped with air, and during that period the middle brakeman was expected to be in the middle of the train because the break was most likely to occur near the middle of the train.

Q. Do you know at the time the Iron Mountain undertook to make the middle brakeman stay in the middle of the train and the Orders took the matter up?

A. Yes, sir, about four years ago Mr. Gould undertook to make a circular that the middle brakeman should ride in the middle of the

train, and that circular was objected to by the Orders, that a man couldn't ride there in winter weather, and that was explained that they could change off, and they still complained that it was not necessary because the train was supplied with air brakes; and the circular was called off.

120 Q. Were you ever able to get the middle brakeman to ride on the middle of the train?

A. No sir.

Q. And is it not a further fact that you were not able to get the Orders to agree to dispense with the third brakeman?

A. Yes sir.

Here the defendant rested its case.

121 *Testimony of W. C. Turner.*

The State, to maintain the issues on its part, introduced the following evidence, to-wit:

W. C. TURNER, a witness for the State, being first duly sworn, testified as follows:

(Examined by Mr. RHOTON.)

Q. What is your business?

A. Chairman of the General Committee of the order of Railway Conductors of the Missouri Pacific System.

Q. That includes the entire Missouri Pacific System?

A. Yes.

Q. Extending through what States? The Missouri Pacific operates through what States, over which you are chairman of the Order of Railway Conductors?

A. Illinois, Missouri, Arkansas, Nebraska and Colorado.

Q. How long have you occupied that position?

A. The last time for two years. Prior to that I had it for six years.

Q. Have you ever had any practical experience in the operation of freight and passenger trains, especially freight trains?

A. Yes.

Q. What experience have you had, and where, and in what capacity?

A. I was brakeman on the Ohio & Mississippi for four years, from 1874 to 1878; on the Missouri, Decatur & Evansville, brakeman for two years and conductor for three years.

Q. Freight conductor?

A. Yes. I was two and a half years conductor on what is now the Frisco line from Springfield to Thayer, and I have been conductor on the Iron Mountain since April 1st, 1886.

Q. Conductor in what capacity, freight or passenger, or both?

A. All freight, with the exception of two years I was in
122 the passenger service.

Q. On what portion of the Iron Mountain system or Missouri Pacific?

A. The First Division, out of St. Louis.

Q. That extends from where to where?

A. From St. Louis, to Poplar Bluff.

Q. During your service as freight conductor on the Iron Mountain road, how many brakemen did you have on freight trains?

A. Three.

Q. Do you know what number of brakemen the Iron Mountain has on its other lines, or the other parts of its system, upon its freight trains?

A. Yes.

Q. How many?

A. On some parts of it, three; and some parts, two.

Q. Where?

A. They have three on all of the main line between St. Louis and Texarkana, and on the Fort Smith road from Alexandria, La., to Kansas City, including the river line.

Q. Do you know about the mileage that the Missouri Pacific operates in Arkansas as compared with the other railroads that are operating in Arkansas?

A. I think the Missouri Pacific has more mileage in Arkansas than all the others.

Q. I mean, from what points to what points in Arkansas does the Missouri Pacific operate railroads?

A. I could not give the State lines.

Q. I don't mean the number of miles, but from what point to what point in operating through the State?

A. They operate from Texarkana to the Missouri State line.

Q. Moark is at the boundary line? That is, from Texarkana to Moark?

123 A. Yes.

Q. Do you know about what said mileage is?

A. I would not be able to say exactly the mileage.

Q. But, at any rate, it is through the State?

A. Entirely through the State.

Q. What other lines do they operate in Arkansas?

A. The Memphis Branch from Knobel to Memphis; the Helena Branch from Wynne to Helena; and from Memphis to Bald Knob; the Fort Smith line from the Arkansas and Louisiana line to the Territory line. And the El Dorado line from Gurdon to El Dorado.

Q. They have a line from Newport, known as the White River line?

A. Yes.

Q. From Newport to the Missouri line?

A. Yes.

Q. How long have you been acquainted with the equipment of the Missouri Pacific in those lines with reference to the number of brakemen they have upon their freight trains?

A. Since 1886.

Q. Since then they have had how many brakemen on their freight trains?

A. Three brakemen on all of it with the exception of the Memphis Branch.

Q. Does that apply both to local and through trains?

A. Yes.

Q. From your experience in the actual operation of trains as a freight conductor on the Iron Mountain, are you in a position to say how many brakemen are demanded for the best service in the operation of those freight trains, both through and local? Are you in a position to express an opinion?

A. I think so.

Q. I will ask you to state in your opinion how many brakemen are necessary for the safe operation of through freight trains
124 from the standpoint of the protection of the crew itself and of the public generally?

A. Have had experience on this system, as conductor I candidly say that three brakemen are almost absolutely necessary for safe operation.

Q. And that safe operation is from the standpoint of the crew itself and of the public?

A. Of the crew and the public.

Q. Are you acquainted with the equipment of freight trains on the line generally with reference to the number of brakemen prior to the adoption of air brakes and automatic coupler system?

A. Yes.

Q. Are you acquainted with the operation of freight trains, both through and local, as to the labor that has to be performed by the crew since the adoption of the air brakes and automatic coupler system?

A. Yes.

Q. I will ask you to state to the court the amount of work that was required upon the part of the freight crew, limiting it to the conductor and brakemen, prior to the adoption of the air brake system and automatic couplers, as compared with the amount of work they must do and do have to do now with the air brake system, and automatic couplers, whether greater or less.

A. The amount of work required of the crew to do over what it was prior to the application of the air brakes and automatic coupler has increased at least fifty per cent to the brakemen and conductor.

Q. That is, as I understand you to say, notwithstanding the adoption and use of the air brake system and automatic coupler, the amount of work that must be done by the conductor and his brakemen, whatever the number, in the operation of freight trains, has doubled what it was under the old system?

A. Yes.

125 Q. Explain to the court why that is true. State the various conditions, and I would like for you to make a clear and detailed statement of the conditions that show an explanation of the statement you have made about it?

A. The conductor's duties have increased by the increased ton-age of the train, and the increased number of cars, and the additional reports he is compelled to make since the introduction of the air brakes and coupler and the additional power of heavy engines. In

the olden days when we had the link and pin coupler and hand brakes the conductor made a report showing the number and initial of the car, where taken and where left, and the seals, and number of miles hauled. Today he has to take the number and initial of the car, where taken, where left, kind of car, weight of car, total ton-age of car, and he must reduce that to pounds on all of his reports, besides showing the seal of each car, if he sets out a car at any point and breaks the seal and takes it up again, he has to show the new seal on it. He has twice the distance to walk to get orders that he had in the old days, and he has double the amount of breakage, pulling out of drawheads, chaining up of cars, that they had in the old days. The brakeman, while he has been relieved from the actual work of setting the brakes to stop the train, except in emergency cases, his duties have increased, because he has double the number of boxes to examine, double the number of cars to inspect at each stop. They have these cars to chain up with chains that it takes from two to three men to handle, especially some of the new cars while they are hard to chain up. The rigging is a hard thing to go through, especially at night. You will find transoms with very small holes, that you have to put that chain through, and it will require one man to display a light so that you can find it, and there is no one man that can handle those chains, and hardly two, because they have to get underneath the car and in between the axle and the truck frame in order to get that chain on the car.

126 Q. Elaborating more fully upon that particular phase of it, is it from your practicable experience in the operation of the train as now constructed that frequently drawheads pull out at night where it is necessary for the train crew right on the main line to repair the breakage that results from pulling out of the drawhead?

A. That's a daily occurrence.

Q. Suppose you are operating a train as now exists and a drawhead is pulled out at night, just what does that train crew have to do, and what is required to repair that to get the train on and get out of the way of other trains to facilitate the operation of trains?

A. The first thing the conductor does is to see that the rear brakeman has gone to flag.

Q. That is, one brakeman clear back away from the train, protecting the others?

A. Yes. Then he has the other brakeman and himself to carry the chain from the caboose to wherever the break may occur. It might be forty car lengths or fifty. The head brakeman is always in the head end of the train. The conductor and the brakeman will carry that chain to the break and put the chain on the car and chain up in order to get it out of the way.

Q. Including the human strength that it takes to repair that break in the night when it occurs, can the conductor and one brakeman do that and do it by themselves with any degree of safety?

A. No.

Q. How many men are required to do that?

A. Three, with the size chains they use at the present time.

Q. What use is there for three men to repair that break? What do they have to do?

A. They have to get underneath the car and place that chain around the truck bolsters, through the transom of the cars, in order to be able to pull the train with the chain. There is nothing to fasten the chain to unless you put it around the truck bolsters.

127 Q. You say that it requires one man to display the light, or hold it so that they can see how to handle the chain and do the work?

A. In some instances with some cars, some cars are built differently so that you could get your chain in without displaying the light, but, you understand, the men in chaining up a car have to get inside the truck; that is, inside the wheels, between the truck frame and the axle, in order to get that chain around it. It takes one man on each side of it.

Q. What is the weight of a drawhead, if they undertake to put a drawhead in? How much strength does it take to get the drawhead there and put it in.

A. They could not do that.

Q. They would have to be chained.

A. It would have to be chained up. They have no way of putting in drawheads.

Q. What do you have to do with the drawhead after it has pulled out?

A. You have to get it out of the way, load it on the car if it is an empty car; load it in the car, and I want to say right here that there are no two men in this court room who can load one of these drawheads in a car.

Q. Does it require three men to do that?

A. Not less than three men.

Q. While that is being done, it is necessary, under your safety, to have one brakeman back protecting the rear?

A. At all times.

Q. So that if he is back there, you say it would be impossible for the conductor and the one brakeman to load that into the car, to comply with the rules?

A. Yes.

Q. When does the conductor have to hand in his daily report?

128 A. When he arrives at terminal points.

Q. So all that has to be done while he is operating the train from one point to another?

A. Yes.

Q. Suppose he does not have his report ready to turn in to the trainmaster when he gets there, what is the result?

A. He is disciplined for it.

Q. At any rate, he is required to have that ready when he gets there?

A. Yes.

Q. I will ask you if the conductor has any time to give to these repairs of the cars and breakages whenever it becomes necessary, or is his time fully required in the operation of the train directing its movements? What is your idea about that?

A. His time is usually taken up all the time. He makes out these reports running, when he is running between stations. If there is a break in the train, certainly his duties require him to attend to that at once. That's an emergency.

Q. What are his duties when there is a break in the train?

A. Immediately to see that his train is protected and get his train together, either chained up or coupled up, as the case may be, and proceed upon his way.

Q. What does he do to protect his train?

A. Sends a flag back.

Q. Does it require him to protect from trains from the other direction also at various times?

A. Yes, at various times.

Q. If he has two brakemen, where would those two brakemen be placed?

A. One flagging in the rear and one in the front.

Q. How many men would that leave to take care of and fix up this breakage?

129 A. The conductor and one brakeman, on the Iron Mountain.

Q. That's where they have three; but where they have two?

A. It would leave the conductor.

Q. Now, could he do it?

A. No.

Q. Under the old system, before the application of the air brakes and automatic coupler, when was this report made out by the conductor?

A. It was made at any time after they got in.

Q. He wasn't required under that old system to have it ready to hand in upon the arrival of his train?

A. No.

Q. Could he, under that system, devote his time more to the looking after the various parts of the train than he can now?

A. Yes.

Q. State if the safe operation of through freight trains is increased by a careful examination of the journals and boxes at the various stops that are made?

A. Yes.

Q. To what extent is a careful examination of those boxes increased by the equipment with three brakemen as compared with if you only had two?

A. With two brakemen, it is impossible where you have to flag at all stops. It is impossible for the conductor and the other brakeman to inspect all of those cars. It usually takes one man on each side to inspect them. They find a great many times the brake beam is down or dragging, or brake rods, or brake rigging, as we call it, which, if allowed to continue, might cause a derailment. The rules provide always that they must inspect the boxes for hot boxes; to keep close watch.

Q. Just what labor is required of the brakemen of a train crew,

and when I speak of a train crew I speak of a crew consisting
130 of a conductor and three brakemen.

A. To go along and put your hand upon them as you may be passing and see if they are warm.

Q. How many boxes are there to each car that ought to be examined by the crew?

A. Eight.

Q. What is the average number of cars in a through freight train as now operated?

A. On some divisions, they handle fifty or sixty cars.

Q. What is required of the train crew in the event they find a box hot?

A. To carry water there and cool if off, repack it, and, if necessary, to put in a brass. If the brass is defective, put in a new brass.

Q. If a new brass is required to be put in, what is required?

A. They have to carry a block about four feet long and 6 x 6, and a car jack, lever, oil bucket, a brass and water can from the caboose to the car that has the hot box, and then jack up the car, take the brass out, put in a new one and re-pack it, after having cooled it off with water.

Q. That has to be done by the train crew, consisting of the brakemen and conductor?

A. Yes.

Q. What is the average weight of a car now, and its ton-age, as compared with what it was under the old system, when the link-and-pin and hand brake was used for the operation of cars?

A. Under the old system, the largest cars we had was forty thousand, and at the present time it is one hundred thousand.

Q. Is it a fact, then, that the average capacity of the cars has doubled in that time?

A. Yes.

Q. What can you say about the equipment that is fur-
131 nished by the railroad companies for raising the car in order to put in a new brass when it is required to be put in? Its equipment now as compared with the equipment when your car was only forty thousand?

A. Just the same as we had those days.

Q. How many men does it take now to raise one of the cars that you now have to operate with the jack that is furnished you in order to put the brass in?

A. Two men, if they are unusually good stout men, can jack up one of those one hundred thousand cars.

Q. Will it take two strong men to do that?

A. Yes.

Q. If they weren't strong men, how many would be required to do it?

A. It would take three.

Q. Is a hot box an unusual occurrence in the operation of freight trains? I mean a hot box in a condition that it requires to be attended to?

A. It is a very common occurrence; a daily occurrence.

Q. Suppose that that does occur under the present condition with

the equipment now furnished you and two brakemen are required to jack the car up, under those circumstances is it necessary to have three brakemen in order to protect your train and to replace the brass, to the best advantage both to the operation of that train and the safety of the public?

A. Yes.

Q. Why are three brakemen necessary under those conditions?

A. You have one man flagging; and in ninety per cent of the cars you jack up the wheel raises when you jack the box up, it raises up off the rail, and you have to get a pole and get two men to bear down that wheel in order to get the old brass out and the new one in.

Q. To do that it is necessary to have three brakemen there?

132 A. You either have to do that or call on the engineer and fireman to help you.

Q. If you do that, then, that cripples the equipment at the engine?

A. Yes.

Q. In the ordinary operation and for the best operation of freight trains, where should the engineer and fireman both sit?

A. On their engine, one on the right hand side and one on the left.

Q. In your opinion, in the operation of freight trains this length of time, their presence there is required?

A. Yes.

Q. And that whenever they are called away from there, or either one of them, it impairs the efficiency of the operation of the train?

A. Yes.

Q. To what extent is the crew,—and I confine "crew" now in my question to the conductor and brakemen, whatever number you have —relieved by the presence of air brakes? What duties are they relieved from?

A. The actual stopping of the train, and the holding them down descending grades. On our line that is done with the air. They are relieved from the actual work of stopping the train, the brakemen are.

Q. Except in cases of emergency?

A. Yes.

Q. While they are relieved of that duty under the present system, are their other duties increased?

A. Yes.

Q. Are the other duties increased to the extent that, notwithstanding the fact that they are relieved from the actual work of stopping the train, and is the work they have to perform greater or less than it was under the old system?

133 A. They are greater at the present time.

Q. Suppose they had the link-and-pin system now operating trains of an average of forty or fifty or sixty cars, without the air brakes, how many brakemen would it take with the old hand brakes to operate that train and operate it safely? Trains now with the increased ton-age, and increased number of cars?

A. About six.

Q. Under the old it was three?

A. Yes.

Q. So that you say the actual work would have been doubled in that way?

A. Yes.

Q. In the operation of a freight train, or any train, so far as that is concerned, suppose that you were a conductor and had some mishap on your road, and you found that you had impaired the strength of the track, broke a rail or something, that would make it dangerous for another train to pass over it. What is your duty, as a conductor, in leaving that place?

A. To leave a flagman to protect it?

Q. You absolutely leave him and go off, then, without him on your train?

A. Yes.

Q. Do those things occur occasionally or frequently in the operation of trains now over the railroads as they exist?

A. Yes.

Q. In the event that you only had two brakemen, and found a place in the road that it would be necessary for the safety of the public, under the rule, to leave a flagman, then how many men would you have left upon your train?

A. I would have one brakeman and the conductor.

Q. I will ask you if at the present time, with the number of cars you now have and with the ton-age you now have, it is safe
134 to operate trains with one brakeman and the conductor?

A. No.

Q. I believe you say that condition occurs frequently in the operation of trains?

A. Yes.

Q. Then, your opinion is, from your experience as a railroad man, when you have been required to leave a brakeman there, that you are operating that train with an unsafe crew? I mean unsafe with the crew you were operating with?

A. Yes.

Q. What are the requirements and duties of brakemen of the train in reference to signalling in the operation of it under the conditions as they arise? I want to show whether under the present operation it is better to have three brakemen in order to convey the signals that are required in the operation of trains than to have two. What do you know about that?

A. On a long train, it is almost impossible to convey signals at certain points on the line from the rear end to the head end with two men.

Q. Why is that true?

A. On account of the curvature in the road, and different conditions.

Q. Suppose you are running through fogs, what is necessary, and what is the difficulty of signalling and the necessities arising for signalling?

A. You can't see a signal in some fogs hardly any distance at all. We have very heavy fogs at times, and then it will be little. Some-

times you can see a signal maybe ten car lengths, and again you can't see it for three. In those cases of fogs the men are usually stationed along on the train in order to convey signals from one end to the other.

Q. Under the present system, what difference is there with
135 reference to the number of car inspectors as compared with what it was prior to the adoption of the air brake and automatic coupler?

A. They have less car inspectors today on the lines than they had before.

Q. What was the duty of car inspectors when stationed at intermediate points?

A. To inspect the trains stopping there, and any hot boxes he might find, or repair any breakage that might be on the train.

Q. If he is not there at these intermediate points, who has to assume and who is responsible for this work?

A. The conductor is responsible, and the brakemen have to do it.

Q. The conductor should see that it is done, and he should see that the brakemen do it?

A. Yes.

Q. Can two brakemen do it and do it with that degree of care that assures the safe operation of the train to the extent that three could do it?

A. No, and perform their other duties.

Q. What is the conductor's duty in order to obtain orders at telegraph stations where he is to receive orders at all? What should he first do?

A. Go to the telegraph office.

Q. He has to leave his train to do that?

A. Yes.

Q. After he gets his orders, what is his duty?

A. Deliver it to the engineer and the engineer reads it to him.

Q. Reads it aloud?

A. Reads it aloud to the conductor.

Q. What is the engineer required to do besides reading it to the conductor?

A. He is required to read it to the fireman.

Q. Then what is the conductor required to do further?
136 A. Read it to the brakeman.

Q. All of them?

A. Yes.

Q. What is the object in having the engineer read the order aloud to the conductor, read it aloud to his fireman, and the conductor to read it to all the brakemen?

A. The object in having the engineer read it aloud to the conductor is to be sure that they both understand it alike, the conductor having read it in the office. Then, the engineer reads it to him, and that shows the conductor that he understands it thoroughly; then the order is read to the fireman by the engineer, so that he may understand just what movements that train is going to make. The conductor reads it to each brakeman so that they may understand

the movements to be made by that train in order that if one man might overlook the meeting point or passing point, one or the other would call his attention to it.

Q. In other words, it seems for the safe operation of trains, that it is better to have as many men on the train, fully advised of the movements that train ought to make?

A. Yes.

Q. So that if one was in a hurry or got hurt the other would know about the movements of the train?

A. Yes.

Q. In the operation of a train as it now exists, (freight trains), does it conduce more towards the safe operation of the trains, both to the crew and the public, to have three brakemen there, all of whom understand from having had this order read to them what movements the train shall make? Is it safer to have three there than to have two?

A. I should say so.

Q. Why?

137 A. Because the larger number of men you have who have that knowledge the less chance there is for them to forget it and overlook it.

Q. Suppose there are three brakemen and one conductor. Are they called upon now to do more work than they were before the air brakes was put into use?

A. I don't just catch the question.

Q. Under the present system in the operations as they now are, where there is a conductor and three brakemen, is each one of them called upon to do more work, more to attract his attention and more to demand his physical strength, than there was under the old system.

A. Yes.

Q. There has been something said about an order being promulgated by the Missouri Pacific to require one of the brakemen, where there were three, to ride in the middle of the train for the safe operation of the train, what do you know about that? What was there about that order they were about to make, why they were going to make it, and why was it not finally promulgated?

A. There was such an order as that issued, and it is a rule today, that the third brakeman ride in the middle of the train for the safe operation of the train. I believe you refer to the protest that was made?

Q. Yes.

A. The protest that was made was made in this manner: That in extreme cold weather, bad weather, where trains were ascending grades the men objected to riding out there because they were absolutely useless at the time, if they rode out there the entire distance over the division. They could not dress sufficiently warm and be any good if they would be required to do any work. They objected to riding up the hills in the middle of the train, and they wanted the privilege of going back and getting warm. That was the protest.

138 Q. This order, as I understand they were about to promulgate required the third brakeman to stay all the time in the middle of the train?

A. Yes.

Q. And that was to extend over all the system, through Kansas and different parts of the country where they had to run through this extreme cold weather?

A. Yes.

Q. I will ask you if, as a matter of fact, it would not conduce to the safety of the train in its operation for the third man to stay in the middle of the train if it was physically possible for him to do so?

A. Yes.

Q. It has also been said here that the Missouri Pacific was going to take off the third brakeman, and that they were restrained from doing that for fear of a strike or some trouble with their men. What was there about that?

Mr. WILLIAMS: State of your own knowledge.

Q. I mean your dealings with the railroad officials and matters of your own knowledge?

A. I would be glad to give you my own explanation of it as I happened to be in the conference that handled that matter. There was an order issued to take off a certain number of the brakemen between Kansas City and Little Rock on the Fort Smith road. The brakemen and conductors immediately protested against that being done on account of the safety of the crew and the additional labor they had to do. Mr. Anderson and myself were called to Coffeyville and we took that matter up with the General Superintendent at that point. From there we went to St. Louis and took the matter up with Mr. Higgins, Assistant General Manager, and from him to Mr. Sullivan. We took that up with seventy odd other cases we had pending at that time. It was handled in the regular way, but there
139 was never any question about a strike. There never were any threats made after we as a committee had gone as far as we could go, which was to Mr. Sullivan, and he declined to replace the brakemen. The Grand officer of the organization was called in to refer the matter to Mr. C. S. Clark, Vice President, who was at that time in Europe. Mr. Sullivan agreed that pending Mr. Clark's return and a final adjustment of the case there would be no more brakemen taken off, and that in making up crews the same number of men would be put on the crews that obtained at that point. That matter is still pending. It has never gone any further. The Vice President never has made an appointment to consider the case either with the committee or the grand officers, but there was no talk of a strike, it wasn't threatened, and it was unthought of. It has not gotten to that point at all.

Q. I will ask you if they, at that time, were claiming that it was necessary to take the third brakemen off of all the through trains, or were they, then, limiting it to certain trains?

A. They limited it to certain trains. They claimed that they would take them off of all fast freights. They had no intention of taking them off of the drags.

Q. Did they, at that time, concede to you in your conference that the three brakemen were necessary on those through trains, except what they designated as "red ball" trains?

A. Yes.

Q. They made no question at that time about the necessity of three brakemen on those trains.

A. No.

Q. If the air pump absolutely gives out, then, in what condition will it leave the train with reference to air brakes?

A. It leaves it absolutely powerless so far as the air brake is concerned, and then it must be handled by the train crew by the old hand brake.

Q. In the actual operation of freight trains, your experi-
140 ence shows that the air pump does give out absolutely so that it is no longer useful?

A. Yes.

Q. It was stated here that when the air pump give out and left the train to be controlled by hand brakes, then it was the duty to only run that train to the first siding. What is the truth about that? What do you know about that in the operation of trains as to what they are required to do about that?

A. I don't know what the requirements of the law are. I can tell you what to do. They deliver the train to the terminals in the old way with hand brakes.

Q. It doesn't make any difference whether the terminal is the first siding or the tenth siding, or where it is?

A. No, it does not. I say that in some cases. There may be other cases where they do send men out to repair it.

Q. What do you know about that from your investigation? Do you know of cases?

A. Yes. I had a case not more than thirty days ago, I think, between Coffeyville and Van Buren, where a man had fifty-five cars. He had an air brake failure and he reported the matter to the train master, and was instructed to proceed with the train and handle it with the hand brakes to the terminal.

Q. I will ask you if, in that instance, in your experience as conductor in the operation of the train, it could have been handled safely with the trains as they now have them with two brakemen and the conductor?

A. I should say not.

Q. You say, then, that a third brakeman would be necessary in that instance?

A. Yes.

Q. I will ask you what your opinion and experience is as to whether or not the presence of third brakemen insures the
141 more speedy handling of freight, the more ready delivery of it and the better serving of the public generally than could be done with two brakemen in the operation of these freight trains?

A. Yes.

Q. Does the through freight have to do switching?

A. Yes.

Q. Explain to the court to what extent switching has to be done, in taking up cars, and what the necessities of the work of the crew are when this switching is being done, picking up and setting out cars, and things of that sort?

A. Under the new plan of operation, they operate by the ton-age system. The difference in the grade lines on different parts of the road require that the crews set out and fill out at different points along their divisions, according to what the grade line may be in front of them. The engine might be rated from here to Bald Knob at one thousand tons from Bald Knob to Newport at fifteen hundred tons. In that case the crew is required to fill out at Bald Knob from one thousand to fifteen hundred. They may have to reduce that train at Newport to one thousand again. That is done in order, at all times, to have the full ton-age of the train on the engine as she is.

Q. As I understand you, in the operation of the trains, in these different districts or divisions, they have the engine rated from one point to another at so many tons?

A. Yes.

Q. And from that point to another at so many tons?

A. Yes.

Q. And that point to another at so many tons?

A. Yes.

Q. For instance, if it is rated from here to Bald Knob at one thousand tons, and from Bald Knob to Newport at fifteen hundred, when they get to Bald Knob they pick up and increase to fifteen hundred?

142 A. Yes.

Q. And from Newport to Poplar Bluff, if rated at nine hundred, at Newport they would have to cut out, or set out, in order to reduce it down to nine hundred?

A. Yes.

Q. Does that process go on in the operation of every freight train, as it is now operated under the tonnage system?

A. Yes, with the exception of the "red ball" or high class trains.

Q. In cutting them out, in adjusting the number of cars in order to fit the capacity that is assigned to the engine, is the presence and work of these three brakemen necessary?

A. Yes.

Q. Could it be done safely, or as safely with two brakemen as with three?

A. Not in my opinion.

Q. Do you know anything about the condition in which the hand brakes are today as compared with their condition at the time when the hand brakes were absolutely relied upon as to efficiency? Take the single hand brake, or the average hand brake, what is its efficiency now as compared to what it was under the old system?

A. The hand brakes of today are not kept up like they were; that is, the rigging is not kept up, not looked after as closely as it was in the days when the brakemen handled them, because at that time each brakeman that handled a train went over his brakes and

repaired each and every one, so that he had them in good condition at all times. Now days, they don't do that.

Q. Then on the average freight train, as now exists, when an emergency arises when the train must be controlled by hand brakes with this impaired efficiency, would it require more or fewer brakemen to handle the train?

A. I should say it would take more.

143 Q. What time is assigned to the crew, (the conductor and brakemen) to make these required inspections of journals and boxes to discover hot boxes? What I am trying to get at is, are they assigned any particular time, or do they have to do that just hurriedly as they can at the different stops, water tanks, stations or various places where they may stop?

A. Yes, they are supposed to make these inspections at every water tank, or every time they stop. The brakemen and the conductor must examine the train, and there is no time given.

Q. With the present duties imposed upon the conductor, has he any time to give to it?

A. Not a great deal. If there are any orders to be gotten, he has to go in the office, of course, and the brakemen examine the train.

Q. Can you tell about the hot box by the smell as operated now, or by feeling of it?

A. The smell is a later consideration. After the box has gotten hot, after it has smoking oil in it, or enough to smoke, you may be able to smell it while you are running.

Q. I mean the ordinary inspection, they are required to make, can they rely upon actually feeling of each box or do they rely upon the sense of smell?

A. No. They feel of the boxes as they go by just laying their hand on the box to see if it is hot.

Q. What is the result of the burning out of a journal or the breaking of a journal which results from a hot box?

A. It generally results in a wreck.

Q. Suppose there is a break in the train—either the train separates or there is a break in the air—what is the result with reference to the train being stopped or moving on, or what occurs?

A. It stops immediately. It is almost like having a collision if you break in two.

144 Q. You mean to say that if the train separates or if there is a break in the air, there is a stop suddenly like that?

A. It is what we call an emergency application.

Q. What is the usual result that oftentimes results to the train crew on the separation of the train or the breaking of the air?

A. Frequently we have men injured in the caboose by the breaking in two or the bursting of the air hose, and it knocks men down out of the cupola, or if he is in the caboose standing up. A good many men are injured that way.

Q. In the actual operation of the trains in these breaks, does it frequently happen that one man of the crew is so injured that he can't help any in extricating you from difficulties?

A. That happens very often.

Q. Would the presence of a third brakeman in those instances add to the efficiency of the operation of the train? and to the safety of the crew itself and the public generally?

A. Yes.

Q. It has been stated here that the automatic coupler eliminates the necessity of men going in between the cars to do the coupling. What have you to say about that?

A. Not altogether. As long as the coupler is in good working condition, there are no defects, it will couple all right. But the brakemen must go in there between the cars and get down and couple the air hose.

Q. Then, I will ask you if it is not true that every time there is a coupling, the presence of a brakeman at that particular point is just as necessary as it ever was?

A. Yes.

Q. Then the only thing, as I understand, that the automatic coupler has done is to remove the danger of his getting his hand or body crushed, but it does not remove any duty from him about being there to perform work?

145 A. No.

Q. So that there is just as much demand now for the presence of a brakeman or some man at each coupler as there ever was?

A. Yes.

Q. That being true, the fact that he has got to be there, although he does not have to put his hands in, the fact that he has to be at these various places where the coupling is made in the ordinary operation of trains, could it be done better from that standpoint with three brakemen than with two?

A. If you have any work to do, yes.

Q. These through freights have work to do, coupling up and things of that sort?

A. Yes.

Q. Is it not true that, even with the best system that have of the automatic couplers, in the ordinary operation of trains, that the men have to actually manipulate that coupler or that breaking in order to make the coupling?

A. Very often they have to hold up the pin; they won't couple without it in some instances.

Q. In the ordinary operation of freight trains, what duty has the freight brakeman to perform with reference to coupling or uncoupling the engine from the train?

A. It is his duty whenever they are going to take up cars, to cut off the engine and get inside the track and couple on whatever cars they are going to pick up.

Q. I mean, is he called on to couple the engine to the train?

A. Yes.

Q. Is his presence there necessary every time the engine is coupled or uncoupled from the train?

A. Either he or some other member of the crew.

Q. I mean somebody has to be there?

A. Yes.

146 Q. So that in operating it you have to make provision for somebody to be at that point whenever there is a coupling or uncoupling made?

A. Yes.

Q. That is done at water tanks and things of that sort?

A. Not necessarily at water tanks, but any place where they have to pick up a car or set out a car, or cut a crossing. In these instances where they stop where there is a road or street crossing, they have to cut. In those cases, it must be a member of the crew that cuts off the car and couples it up.

Q. Does the through freight do switching at places like Jacksonville, Newport, Walnut Ridge, Corning and those places where they have public crossings?

A. Yes.

Q. In doing that is it necessary to move the train backwards and forwards across those public crossings?

A. In a good many places they have to move over public crossings, yes.

Q. I will ask you to state whether or not in those instances the safety of the public can be better served by having the third man, or three brakemen, instead of two?

A. Yes.

Q. Why is that true?

A. Because there must be a man on the rear end of the cars that are backing up. There is one man out flagging, and the conductor, in all probability, is getting his orders and his bills, while the brakemen are doing the switching, and they really need a man on the hind end of the cut of cars which is backing back.

Q. What is the need of a man on the back end of the cut of cars running back, or being backed or moved by the engine?

A. To warn the public to look out.

147 Q. Not only to warn the public, but if he saw somebody there that was about to be injured, to warn the engineer to stop the train?

(Objected to by defendant as incompetent, irrelevant and immaterial.)

Q. State what is true about that?

A. It is a protection to the public, and to give signals to the engineer.

Q. Suppose you have been stopped on the main line, and you send a man out to protect the train, as you are always required to do, and get ready to move on. Now, state whether or not it is a protection to the crew and the public to have your freight train move out as rapidly and as quickly as possible?

A. Yes.

Q. Why is that true? If they don't do it, what may occur?

A. We have in our supplies fusees and torpedoes. A fusee is supposed to burn ten minutes. A man out flag-ing three quarters of a mile, or such a matter, is called in; he immediately lights one

of those fusees, if at night. By the time he gets in to the train and you pull out, you want to get away as quickly as possible on account of the fact that fusees may burn out and not protect you.

Q. By having three brakemen instead of two, so that you have your flagman back there, can you get the signals to that engineer? State what advantage there is, if any, in having three brakemen in order to get that train out of the way of approaching trains at a higher rate of speed than you are traveling?

A. It would be necessary at curves. On curves you have your men stationed so that you could get your signals to the engineer directly.

Q. Suppose instead of being on curves, you were in a foggy district, in time of heavy fog?

A. The same thing would apply. You would leave your men stationed out so that you could reach the engineer directly with signals.

148 Q. Would you say, in your opinion, under those conditions, three brakemen are safer and better than two brakemen?

A. Yes.

Cross-examination by Mr. J. E. WILLIAMS:

Q. You say, you are now working for the Missouri Pacific Railway Company?

A. No.

Q. What's your business at this time?

A. I am general chairman of the committee of the Order of Railway Conductors.

Q. In their employ.

A. Yes.

Q. That is, on the Missouri Pacific?

A. Yes.

Q. The Missouri Pacific is the last road you worked for?

A. Yes.

Q. In what capacity?

A. Passenger conductor.

Q. How long had you worked as passenger conductor?

A. Two years.

Q. How long have you been head of the committee of which you speak?

A. I am not head of the committee now.

Q. What are you now?

A. General Chairman of the Committee.

Q. How long have you been in that capacity?

A. It will be two years the 15th of January.

Q. How long since you have been in the train service at all?

A. Six years.

Q. You have been out of the service, then, six years?

A. Yes.

149 Q. Isn't it eight years since you ran a freight train?

A. No, I think not.

Q. Do you know?
A. Yes.
Q. When did you run your last freight train? I mean in the regular service?
A. I was extra passenger man and run a freight too, during the year 1905.
Q. How long were you extra passenger man before you were on the regular list?
A. I was extra passenger man the two years that I was in the passenger service.
Q. You say, then, it is six years since you have been in the freight service?
A. Yes.
Q. Did you ever run a freight train on any other road than the Iron Mountain?
A. Yes.
Q. Where?
A. The Kansas City, Springfield & Memphis, from Thayer to Springfield.
Q. How long ago was that?
A. 1883 to 1885.
Q. How many brakemen did you have then?
A. Three on the local.
Q. You were running on a local?
A. Yes.
Q. What other road in the southwestern country have three brakemen besides the Missouri Pacific?
A. None that I know of.
Q. If all these calamities are likely to follow the use of two brakemen, can you tell how these other roads manage to get along?

150 (Objected to by plaintiff as incompetent, irrelevant and immaterial; objection overruled.)

A. I am not able to answer. So far as the other roads are concerned I don't know anything about it.
Q. Then, as a matter of fact, you don't know how freight trains manage to operate with two brakemen?
A. I haven't been in contact with them.
Q. Under the old system, a brakeman was a brakeman?
A. Yes.
Q. He did braking?
A. Yes.
Q. He doesn't do it now, as a rule? That is to say, he does not have anything practically to do with the brakes?
A. Yes, he is a brakeman.
Q. What does he have to do with braking? He is called a brakeman, but what does he have to do about braking?
A. He performs the duties of a brakeman whenever it is necessary, of setting brakes. If you mean that he is not a brakeman in the sense that he sets the brakes, he does set the brakes every time he sets out a car or picks up one. He handles the brakes then.
Q. In the running of the train along the road, as a matter of fact,

he does not perform the duties which he originally performed, and from whence he got his name?

A. Not always.

Q. As a general rule, he does not?

—. ——.

Q. For instance, you say that under the old order of things with the present ton-age, it would take six brakemen?

A. It would not be as safe with six under the present ton-age as with three under the old ton-age.

Q. Then, the modern appliances have reduced by one-half the number of men to run the trains under equal conditions?

A. It seems to have done that.

151 Q. You say the conductor's duties are now increased in what respect?

A. In making out of reports. His duty has increased in the making out of reports at least fifty per cent.

Q. What report does he have to make now that he did not make before?

A. He makes a more complicated report by far. As I explained to you before, he has to reduce his ton-age to pounds, and he shows many things in the report that he did not show in the olden times.

Q. They are the same reports, except you say that they are more complicated?

A. Yes.

Q. They always have to make reports?

A. Yes.

Q. I wish you would state what a through train is; what do you understand to be a through train?

A. A through freight train? That is a train that does not do local work, loading and unloading merchandise, and is carded as a through freight train.

Q. Through in what sense?

A. From one division point to another.

Q. As an example, a freight train made up in Argenta yards going north, having freight in it consigned to St. Louis and all over the country?

A. Yes.

Q. And all the cars in that train are *through* in that sense?

A. Yes.

Q. In other words, they are not cars to be set out here and there for the local trade?

A. No.

Q. Is it not a fact that that train is always made up in the yards?

152 A. Not always.

Q. At the terminal points?

A. Not always. They may have to fill out at some places.

Q. Does the crew have anything to do with the getting up of the train preparatory to its going out?

A. In some instances, yes, but not in this yard.

Q. Do they in any other terminal yards except on this particular division?

A. In turn-around points and intermediate terminals.
Q. But ordinarily the train is made up by the yard crew?
A. Yes.
Q. And it is delivered to the conductor and his crew ready to go out?
A. Yes.
Q. Is it not a further fact that that train is inspected before it starts out?
A. At some points, yes; at some points, no.
Q. Isn't it the rule of the company, and the practice at all terminal points, to have the train thoroughly inspected before it is turned over to the crew?
A. I will say that in the large terminals, such as Argenta, yes.
Q. Are not these large terminals the points from which these through trains nearly all eminate?
A. No.
Q. Why not?
A. We have a great many division points smaller; smaller division points.
Q. Through trains all eminate from division points?
A. Yes.
Q. Isn't there an inspector at all division points?
A. Not at all.
Q. Are they not at all in Arkansas?
153 A. I could not say in Arkansas.
Q. Can you name a division point in Arkansas where there is not an inspector of the train on the Iron Mountain Railroad?
A. No, I don't know that I can.
Q. Now, if a train is carefully inspected before it is turned out, that reduces the likelihood of any accident on that train?
A. Not necessarily. It reduces it in this: If there was any hot box or any defect in the equipment they would probably find it. But very frequently the yard crew in switching these cars cause defects in the cars that will not be seen by the inspector.
Q. It reduces the probability of accident to these trains? Don't you know it does?
A. Just the same as a third brakeman or the brakeman's examination on the road, yes.
Q. If it does not do that, what is the use of an inspector?
A. An inspection is necessary.
Q. Then it does reduce the labor of the brakeman to that extent?
A. No.
Q. Why not?
A. Because the brakeman has to inspect that train at every stop just as much as if there had not been any inspection at all.
Q. Do you say that the brakemen give the same inspection to cars that the car inspector does?
A. Just about.
Q. What is the use of a car inspector, can you tell me?
A. I would hate to put myself on record as to what car inspectors

in some of these places do. They don't have enough of them to do much good.

Q. They don't belong to your order?

A. No. That would not cut any figure, though.

Q. If they don't accomplish any good, then they are of no use?

A. They do accomplish good.

154 Q. To the extent that they accomplish some good, they take some labor off of your train crew?

A. I claim no. Let me explain to the court, if you please. If they find a bad car, it is set out or cut out right there in the terminals.

Q. If it wasn't inspected, then you or your crew would have to find that bad car?

A. Yes.

Q. You say that doesn't help you?

A. We have to make the same inspection as if that car was there.

Q. All along the line?

A. Yes.

Q. You say you do that?

A. The men do; I don't do it.

Q. I mean the conductor. Does the conductor do that?

A. No, the brakemen.

Q. Do you mean to tell the court that your brakemen or the conductor goes along and feels every one of the boxes on that train every time it stops?

A. If there is any sign or evidence of any heating about the boxes, they lay their hand upon it. They don't lay their hand upon every box.

Q. It is only when you see some sign that the box is hot that they go and lay their hands upon it?

A. Very frequently they go along and lay their hands on the boxes.

A. I asked you the question, if you mean to say that the conductor or brakemen at every stop go along and feel every box?

A. It would be an impossibility.

Q. You know they don't do it?

A. No.

Q. Then, they look for some indications for a hot box

155 before they put their hands upon it?

A. Not always.

Q. But do they generally do it?

A. If a man examines the cars he has his own ways of ascertaining if a box is hot.

Q. As a matter of fact, isn't it the custom to pass along the car and notice them and look for any evidence or indications of a hot box, and then feel it to see if this box is hot? Don't you know that's the way?

A. Possibly some of them do that.

Q. Generally, don't they do that?

A. More or less.

Q. That's not answering my question?

A. No.

Q. You say they don't generally do it?
A. No.
Q. How do they do it?
A. By feeling the boxes.
Q. All the time?
A. No. I say, generally.
Q. All the boxes?
A. No.
Q. Do they ever feel all the boxes on a train?
A. No.
Q. How do they select which they will feel and which they won't?
A. The man who inspects a certain part of the train will probably feel the boxes, that part of it that he inspects. It is very frequently the case that a train is not all inspected; the stop is not long enough to give the men time to inspect the train.
Q. They, then, don't inspect it?
A. Not always.
Q. Now, the part they do, do they feel all the boxes on any
156 one car or any three cars, or any half dozen cars?
A. I could not say whether they feel all the boxes or not.
Q. If they don't feel all, have they some evidence or some way or some method in order to determine which ones they will feel, and which they don't?
A. Not necessarily.
Q. How would they go about it? How would they know which to feel and which not?
A. You will have to put your question different if you want me to answer it.
Q. If that is a question that you can't answer, then say so? I asked you the question how they determined, if they don't feel them all, which ones they will feel and which they won't?
A. They can tell, of course, by seeing if the box is smoking, or other indications. If it is or has been hot it will show evidences of it; it will show evidence of having been hot at some previous time possibly.
Q. That is done by looking at it, then?
A. They look and feel the same.
Q. They look and feel when there is anything at all to be felt?
A. Yes.
Q. You were speaking awhile ago about switching. A through train does not have very much of that to do. Isn't that a fact?
A. No.
Q. I don't know that I understand you?
A. You asked me if they don't have switching to do.
Q. I say they don't have very much to do?
A. They do have it to do.
Q. We will take a train going out of Baring Cross, for instance. Hoxie is the nearest terminal for freight?
A. Yes.
Q. How many towns between Baring Cross and Hoxie would that freight train be likely to have any switching to do?

157 A. Bald Knob and Newport, which are both junction points. I can't say as to what the grade line is between these points. Referring to that, a few minutes ago, I referred to that on account of the points being familiar to everybody here.

Q. I will use that as an illustration. Ordinarily wouldn't that be all the setting out or taking on of cars that the through freight train would have anything to do with?

A. No. Very often a through freight train will start out with a train of empties and have instructions to peddle them out from one end of the division to the other.

Q. Then, you are doing local work?

A. No.

Q. That's not a through train?

A. A through train, but setting out or picking up. In the sense that we refer to a local, that is not a local.

Q. That is not a through train. That is, you are not carrying cars from one division to another?

A. That's a through train so far as this law applies.

Q. You call that a through train?

A. Yes.

Q. How many men does it take to couple a car?

A. To make one coupling, I should say one man.

Q. Do you ever make more than one at a time?

A. Yes, we make a good many at times.

Q. They are made, one after another?

A. Yes.

Q. When you do this coupling, you take a cut of cars out of the train and set it in on some sidetrack?

A. Yes.

Q. Do you need any more than one brakeman to do that?

A. Yes.

Q. Why? What does he have to do?

158 A. One brakeman has to open the switch.

Q. Can't the same brakeman do that?

A. He can. He could do that.

Q. You can't go in on that side track until it is opened?

A. No.

Q. There would not be any need for any other man to do that. Don't you know as a matter of fact that he does do it?

A. Yes. When he goes to set out a car, if it is near the engine, that's what he does.

Q. The brakeman that follows that cut of cars is the man who opens the switch?

A. Yes.

Q. Then, he rides that car down to the coupling?

A. Yes.

Q. Then, makes the coupling?

A. Yes.

Q. Is it not a fact that these cars with these automatic couplers couple up together as they go together?

A. Not at all times.

Q. That's what the law requires they should do?
A. Yes.
Q. If they are in the condition which the statute requires them to be, they will do it?
A. Yes.
Q. So that when you are setting out those cars or taking out a cut of cars, you don't need but one man?
A. That's your opinion.
Q. I asked you?
A. Not in my opinion. You need more.
Q. What has he to do?
A. There are a great many places where one man can be on the rear end of a string of cars and see the engineer in order to
159 get the proper signals.
Q. How many cars would he have to set out?
A. Sometimes they set out a car behind fifty.
Q. Do you mean to say he would bring fifty up to set out that car?
A. Yes.
Q. Wouldn't you, in that case, set your fifty out and then pull the other out?
A. No. I would set the other one out first.
Q. At the end of the string?
A. Yes.
Q. Then, where would the conductor be?
A. The conductor would be attending to whatever duties the rules and his business required at that time at that place.
Q. What are they, and what would they be?
A. Possibly getting orders.
Q. How long does it take him to get his orders?
A. That largely depends upon the dispatcher.
Q. Arn't the orders usually ready for him there?
A. No, not always.
Q. Usually are they not ready? The dispatcher has some orders for the train usually before he gets there?
A. Not necessarily. He may turn the board and say to hold that train for orders.
Q. The conductor has nothing to do until he gets orders.
A. He goes in there and signs his orders whenever they are ready for him; usually when they are switching, as a rule the conductor will be out there looking after that work.
Q. Where you have got any work to do around the station, does the conductor go and get his orders the first thing?
A. Not in all cases.
Q. Don't you know the rule prohibits him from getting
160 them until he is through with his work and is ready to go out?
A. No. In the first place, when the board is turned, his first duty is to ascertain what that red board is for. It is just possible he may have to protect himself in some way by a flag.
Q. What is an order?
A. A train order. An order issued by the official in charge, the train dispatcher, which supersedes the rules.

Q. It is for the movements of that train?

A. Yes.

Q. Then you don't get it until you are ready to move that train?

A. Very many times, yes.

Q. Is it not a fact that is the last thing you are supposed to do?

A. No.

Q. Don't your rules require you to get them——

A. (Interrupting.) The rules require you to go the first thing to the office when the board is turned.

Q. That is, to report. But an order for the movement of that train is the thing you get when you are ready to move that train? Isn't that a fact?

A. That would be the case if you had a lot of work to do.

Q. I am talking about while working around setting out these cars?

A. The first thing he does is to get his orders.

Q. Suppose you are detained there twenty-five or thirty minutes, would he go on those orders?

A. He would unless he had further orders not to.

Q. Would he go back to find out whether he had further instructions?

A. If he was going to have 25 or 30 minutes delay there, when he went there and got them, he would say to the dispatcher, "I am going to be delayed here twenty-five or thirty minutes doing
161 work." If the dispatcher saw fit to change the order he could do so.

Q. Would the conductor go back there to find out?

A. After the board would be pulled in, if the board was to show red again he certainly would.

Q. Under any circumstances, would he go out under an order 25 or 30 minutes out?

A. Yes. That order is good until it is recalled.

Q. Would he not go back there? Would he expect the dispatcher to hunt him up?

A. The dispatcher would not, but the operator would.

Q. Now then, after you have gone to the office and gotten your orders, do you, as a conductor, have anything else to do except to help the crew?

A. No. After you get your orders and deliver your way-bills, or get your bills, then it is your duty to get the number of cars you are picking up and the seals.

Q. Then he can go out and help the brakemen in their switching and anything else that is being done?

A. Yes.

Q. You said something awhile ago about cutting these crossings. Can't that be done when you take your cut of cars out first?

A. Not always.

Q. You are not required to do that unless detained ten minutes or more at stations?

A. Five minutes.

Q. The rule varies at different points?

A. Different States have different laws, and different cities, I suppose. At most places it is five minutes.

Q. You have an instance awhile ago of the air giving out at some place and the order was to carry the train into the terminal. Do you remember how far it was from the terminal?

A. 85 miles.

162 Q. That was where?

A. Beyond Van Buren, between Van Buren and Coffeyville.

Q. Are you familiar with the law and the orders of the Interstate Commerce Commission?

A. Yes.

Q. Don't you know that roads are not allowed to do that?

A. I know what the law is.

Q. You know that they are not allowed to do that by the law and by the orders of the Interstate Commerce Commission?

A. I know what the law is. I know what the company does.

Q. Do you mean to say they make a habit of doing that?

A. I did not so testify, but I say they do it.

Q. Do you know of any other instance?

A. Yes.

Q. Is it the company's custom to do that?

A. It has been the practice on the Missouri Pacific to do that. I have had notice of three different cases of it.

Q. Then, as I understand you, the Missouri Pacific is violating the Interstate Commerce Law in the movement of its trains?

A. They are in that case.

Q. But, if the Interstate Commerce Commission rules are obeyed they could not do that?

A. No.

Q. As a matter of fact, don't the rules of the company themselves direct that they should be carried to the nearest siding?

A. The rule of the Company is for the conductor to report and get instructions.

Q. In speaking about this agitation over the Iron Mountain taking off its brakemen, you say there was no threat of a strike?

A. No.

Q. Did you know anything about the committee that appeared before the legislative committee when this bill was pending?

163 A. No.

Q. Is it not a fact that as soon as that matter came up, this bill was drafted by your committee and other committees for the purpose of forestalling any action of the Iron Mountain Railroad?

A. I know nothing about any committees.

Q. Do you know Walsh and Jackson and the third man that appeared before a committee of the legislature here?

A. I know the gentlemen, Walsh and Jackson, but I don't know anything about them appearing before the legislature.

Q. Do you know anything about a statement that was made before the committee at that time, that the committee had stated to the

road that if they took off one brakeman, the Order would take off the other two?

A. No.

Q. You never heard of that statement being made?

A. No.

Q. You make your reports out, I believe you say, between stations; that is, on your runs?

A. Yes.

Q. Except for receiving orders, and at meeting points for passing trains, and the occasional setting out of cars at intermediate points, the through train makes no stops?

A. Taking on water and coal.

Q. Of course, you stop at tanks to replenish the water supply, but isn't the coal taken on at division points?

A. As a rule, they have coaling stations between division points.

Q. With those exceptions, there is no stop made by through freight trains?

A. Outside of the stops they may be ordered to make to set out and pick up cars.

Q. With those exceptions, and at meeting points, there
164 are no stops except for water and coal? In other words, it is a train that omits as many stops as it can?

A. Yes.

Q. During that time, assuming that you meet with no accidents, the conductor has nothing to do but make out his reports?

A. And watch the running of his train.

Q. He engages in that too?

A. Yes.

Q. Then you have got, even with the two brakemen, five men to watch the running of your train?

A. If you include the engineer and fireman.

Q. They are doing some watching too?

A. Yes. They attend to the duties.

Q. Their duties are at the head end?

A. Yes.

Q. With that exception, the conductor makes out his reports between these stations?

A. Yes.

Q. But that does not add anything to the work of the brakemen?

A. The making out of the report? No.

Q. That is solely the work of the conductor?

A. Yes.

Q. And it is done at a time when his train is running smoothly?

A. Yes.

Q. Where his attention would not be taken up with anything else?

A. The brakemen usually watch the running of the train when he is making out his report.

Q. When the brakemen have nothing else to do, when he is not sidetracking or stopping, or anything of that sort, he has nothing to do but look out?

A. No. You understand there is supposed to be a man
165 watching on each side of the train.

Q. Well, you have two brakemen?

A. Yes.

Q. One rides at the head end and one at the hind end? If you have two, that's the way they would ride?

A. Yes. But the conductor and the rear brakeman, as a rule, watch both sides of the train for hot boxes, and where a car breaks down or anything of that kind occurs or something dragging under the train stirring dust, they give orders to stop.

Q. You all keep a lookout for those matters?

A. Yes.

Q. What is the weight of these chains you speak about?

A. I could not give you the exact weight of them. I never weighed one of them. I have undertaken to help put one on a car, and I know it was as much as two men could manage or carry.

Q. What would you consider a sufficient weight for two men to handle?

A. That all depends upon circumstances. If you were going to take up something and load it and get rid of it right away, get it off your hands in a minute, you could handle much heavier weights than you could when you have to carry it forty or fifty car lengths?

Q. But in case you have to carry it forty or fifty car lengths, what would you consider that two men could easily carry?

A. One hundred and fifty or two hundred pounds is a hard drag for two men.

Q. If those chains don't weigh over 125 or 135 pounds, it is not a heavy weight?

A. It is a mighty heavy load when you go forty or fifty car lengths.

Q. Do you mean to say two men can't carry one hundred and fifty pounds?

A. I say they could carry it, but I don't say they could
166 carry it easily.

Q. Isn't it a fact when you come to chain up a car that only two men can work at it anyhow?

A. No.

Q. How does the third man work? Can any more than two men work at it?

A. Yes.

Q. Explain how you would use the third man?

A. In chaining up a car with these big chains they use now, when they back up against the train with the chain coupled into the drawhead at front, it usually takes two men to get that chain up over the transom to the man behind to drag it through. One man must get in there between the truck and the axle and hold that chain up and pass it through.

Q. Have you, with the assistance of one brakeman, in the course of your career chained up cars?

A. Yes; I have chained them up alone.

Q. Why do you say you will need three men to do it?

A. We had different appliances. We used to put the chain around and hook up over the truss rod. We didn't have to get under the car.

Q. Where are these chains carried?

A. In the caboose.

Q. Altogether?

A. Yes.

Q. Isn't there one on the engine too?

A. Yes, but you don't use it; it is kept there for the engine chain.

Q. Isn't there a chain there that you can use?

A. Not for chaining cars. As long as you have a chain in your caboose, you use your chains in the caboose.

Q. You don't use the one on the engine?

167 A. No.

Q. You said something about carrying the drawbars. Is it not a fact that they are thrown outside and picked up by the section men?

A. Where they belong on a loaded car, yes. If they belong to an empty car, the instructions are to put them in the car where you can.

Q. In that particular car that they came off of?

A. Yes.

Q. Otherwise, they are just thrown out of the way for the section force to bring over?

A. Yes.

Q. Now, on the St. Louis, Iron Mountain & Southern Railway, at coal chutes, and at yards, are you not protected by boards and flags against inferior trains?

A. No. You have a yard limit board, but that does not protect you; you must flag.

Q. That is, you flag your rear end when you are stopping?

A. Yes.

Q. But, if you are beyond the board, that will protect you from anything. If it was behind you, it would protect you from anything following?

A. No.

Q. Or ahead, it would protect you from anything coming?

A. No.

Q. What is it for?

A. The rules require you to flag just the same. The yard board is this: They are supposed to reduce the speed; that is the rule of the company. They must reduce the speed inside the yard limit board, but, if you are inside that yard limit board and get hit by a train following you, you will be censured for that.

Q. Without a man at the board, or any other board that is between you and any train that may be coming from that direc-

168 tion, it does not protect you?

A. No, it does not protect you.

Q. You said something about getting out of a station before the fusee burned out. What is a torpedo? What is that used for?

A. To attract the attention of the engineer to the danger in front

of them. They are placed on the rail. A small cap placed on the rail.

Q. It serves practically the same purpose as a fusee?

A. Just the same.

Q. That doesn't burn out?

A. No.

Q. If you have got your torpedoes out, and the train following you strikes those, it does not make any difference whether it is ten or twenty minutes?

A. Yes. They might stop when they strike the torpedoes, but when they didn't see anything of any fusee or any red light, they would proceed on their way.

Q. Would they proceed slowly and with caution?

A. How far?

Q. Doesn't the rules require that?

A. They require them to proceed a certain extent and lookout, but if they were located in a bad place, around a curve, and they didn't see any red light or anything of that kind, then they would go on.

Q. How far would they place these torpedoes?

A. It would depend largely on the lay of the track, whether it was going uphill or down hill, or around curves; altogether on the conditions.

Q. How many of them would you place?

A. Two.

Q. You could place more?

A. Yes.

169 Q. As a matter of fact, if you placed torpedoes out, I will ask you if you could not place them at such distances that the engineer, when he struck the first one, would naturally slow up his train, if he obeyed orders?

A. Yes.

Q. Or followed the rules. He would go a little way and strike another, if you would put them out?

A. Yes.

Q. And a little way further he would strike another?

A. Yes.

Q. Now then, under that system, wouldn't it be practically easy for the conductor or train men to entirely protect his train against the train coming behind?

A. Torpedoes is not a full protection. It is only a partial protection.

Q. You don't answer my question. If he had those torpedoes set in that way, up to the point where the advancing train would come in sight, his rear end, and the engineer on that train obeyed and did what he ought to have done, on striking these torpedoes, would it not protect your train?

A. No.

Q. Why not?

A. Because your flagman was down.

Q. But he comes in sight of your train before he strikes the last one?

A. Yes.

Q. He would not run into you?

A. I don't know whether he would or not.

Q. He would not if he obeyed orders and obeyed the rules?

A. No.

Q. Now, the prosecuting attorney asked you about the possibility of injuring a man if you had three brakemen, when it would
170 leave two. Suppose you all got injured, what then?

A. It would leave you nobody.

Q. Then, there would be no limit to the number of men you ought to have, according to that rule?

A. I don't see that that applies.

Q. Why not? Two men are as liable to get hurt as one? Sometimes all get hurt?

A. Yes. As I understood his question, when I answered that, it was to apply to a case where the conductor was on the head end approaching a meeting point or station, and there was but one man on the rear end of the train. If they broke in two and anything happened to the man back there, the conductor does not know whether he has got any protection or not.

Q. That's the way you understood it, and that's all you meant?

A. I meant in those cases that a man might be injured, and you would have no protection.

Q. That is when going into stations?

A. Yes.

Q. And likely to have the necessity of protecting your rear end?

A. Yes.

Q. That's as far as you meant that answer to apply?

A. That's how I understood the question.

Q. That's simply an emergency, an accident that is likely to happen?

A. Yes.

Q. You get in a ditch once in awhile?

A. Yes.

Q. A whole lot of you get your skulls broken. You don't want a hospital to follow for that reason?

A. No.

Q. You get a wrecking crew occasionally?

A. We order them when we need them.

171 Q. Nobody thinks it necessary to send one along with you all the time?

A. No. That has not been considered necessary so far.

Q. I want to ask you another question. You say you have to leave a man out; you might have a burned bridge or broken rail or something of that sort?

A. Yes.

Q. Don't the other roads that only have two brakemen have to do the same thing?

A. I don't know what their rules are.

Q. Isn't that a general rule that prevails on all railroads?

A. I should judge so.

Q. They would be crippled in some manner? Suppose you are going along and happen to strike two or three of those things. That would take your whole force?

A. After you have left all of your men flagging, you would simply have to wait until they brought them to you on some other train.

Q. You could do that the first time as well as you could the third?

A. Yes, you could tie up.

Q. If your force was crippled, you could notify the office that you didn't have force enough to run and run to the next siding or telegraph station? You could do that?

A. Yes, you could do that.

Redirect examination by Mr. RHOTON:

Q. I wish you would state whether or not, under the present system of the automatic coupler, the draw heads are pulled out more or less frequently than they were under the system where you had the link-and-pin?

A. We have more of those breakages, pulling out of drawheads, at the present time, than we did under the old system.

172 Q. Why is that true?

A. On account of the increased power of the engines.

Q. Is there anything else that causes the draw heads to pull out oftener than they did with the link-and-pin?

A. Yes.

Q. What is it?

A. The equipment of the car is not kept up with the increased power of the engines. They have a good many old cars in the service.

Q. Under the old system of the link-and-pin, which would give way first, the draw head pull out, or would the link break?

A. The link would break as a rule, or the pin would break.

Q. You say the strength of these automatic couplers and the resisting power of the drawhead has not kept up with the increased power of the engines?

A. The resisting power of the draw head is all right. It is the resisting power of the way it is put in; the draught timbers.

Q. Then, it is the holding power of the wood, or that part of it? That has not kept up with the power of the engines?

A. They are not built heavy enough to withstand the enormous pressure of these ton-age trains.

Q. What can you say about the frequency with which the train crew is now called upon to repair these breakages from the draw heads pulling out, as compared with the old system?

A. There is 50% more of it to do than there was under the old link-and-pin system.

Q. You have been asked whether or not the brakemen do examine each box and brass at these stops. State whether or not it would be

better and safer in the operation of the train if they could examine every one of them at the various stops?

A. It would be safer if they could examine all of the running gear of the car.

Q. Of course, three men can come nearer up to that meas-
173 ure than two possibly can?

A. Yes.

Q. You have been asked if the fact that more work was put upon the conductor, whether or not that put more work upon the brakemen. I will ask you whether or not it is true that the fact that more work is put upon the brakemen, if that does not draw him away from a good many things that he could formerly do?

A. Yes.

Q. Thereby leaving to them many things to do which they formerly could do?

A. Yes.

Q. And in that way put more work upon the brakemen. I mean, in this switching, in the operation of trains, and movement of trains generally?

A. The making of the report, as I understand you to refer to.

Q. Any duties that had been put upon the freight conductor generally?

A. Yes.

174 *Testimony of W. E. Pearsall.*

W. E. PEARSALL, being called by the State, and first duly sworn, testified as follows:

Examined by Mr. RHOTON:

Q. Where do you reside?

A. Argenta.

Q. What is your business?

A. Freight conductor.

Q. Where have you served in the capacity of freight conductor?

A. On the Iron Mountain going on seven years, I believe, to the best of my recollection.

Q. In what capacity or train service did you serve before that, if any, and where?

A. I broke about six years.

Q. Where?

A. On the Iron Mountain, and three years on the L. & N.

Q. So then, you have had experience in braking nine years and as freight conductor six years?

A. That is, over six years; going on seven.

Q. Where on the Iron Mountain division have you served in the capacity of freight conductor?

A. Between Van Buren and Argenta.

Q. Have you served as freight conductor on both local and through trains?

A. Yes.

Q. To what extent have you served as freight conductor on through trains?

A. The majority of my work as conductor has been on through freight trains.

Q. During that time, as freight conductor, on the Iron Mountain, how many brakemen have you had with which to operate your trains?

175 A. I have had three brakemen on all trains except one trip; I think possibly I ran what they call a "red ball" train through with two brakemen. That's the only time I ever ran a train with two.

Q. In your experience as freight conductor, six years on the Iron Mountain, are you able to state how many brakemen are necessary for the safe operation of freight trains as now operated, from the standpoint of the crew itself, and of the public generally?

A. I think three brakemen is more safe, both to the employés and to the public.

Q. Will you state why that is true? You can go somewhat into details?

A. We have peculiar conditions in this country that don't prevail in other localities. Suppose you take Arkansas. They possibly change trains or take up and do switching more than they do in a great many other places. That is, we seldom ever have what is known as a straight through train; what I mean, a car destined from here to Van Buren, we will say. It happens we have it, but more or less it is picking up something or setting out something, or setting out empties and picking up loads. We have a great deal of switching to do. That switching occurs somewhere on every trip. Take in Arkansas in general, there are a great deal of sawmills. It is not true in my district. We have coal mines *on* the district I am working on. But other districts have sawmills. There is more or less picking up of cars at those places, or setting out of empties, placing empties for loading &c. Consequently, in my opinion, it makes it more essential for a third brakeman. Another thing, or, rather, it has been for the last year or two especially; there has been a large volume of business moving through this country, and we have got a lot of trains on the road. We get in places—and that happens nightly or daily—where we all get bunched up in one place for a passenger train.

Q. Where that occurs, state the exigencies that arise, and
176 the necessity of men in operating those trains; those conditions that daily and nightly arise in the operation of freight trains.

A. You take a siding where there is a curve, and say two or three trains there; there has got to be signals transmitted around there to saw those trains out. There have been accidents too, even under those conditions, but they are very few. But it leaves the absolute necessity there around the curve to transmit signals safely to the engineer, from one to another. I have seen the time that I have used six of them.

Q. Explain more in detail, if you can. For instance, when you

say you daily get into situations where different passenger trains are due, going different directions, and freight trains there, just what do you have to do often?

A. Say, for instance, I was a rear man. We will take Plummerville; that's a curve going both ways; a very bad place coming this way. If I was back there a mile or a mile and a half, I am the third man. We have got to meet a passenger train up there, but there may be one due from the other way. I know there is a "saw" there; my duty is to first see whether or not my flagman goes out to protect me from the train going north, we will call it. When I have done that, and know my train is protected, my next move, if I am a practical conductor, is to go there to the head end and find out what the movement is going to be there, or co-operate with the other conductors and have an understanding as to how we are going to get these trains away. That's your duty. The result is, we may be made to go around curves, and you can't see for the obstruction of seed houses or trees. We need that brakeman very badly to transmit signals. I might have sixty-five cars, like I have often. In that case, it is guess work unless you have somebody to transmit signals.

Q. What do you mean by a "saw"? You say you may have a "saw" there?

177 A. The side track will not hold the trains that meet. For instance, there are three trains going north, and the side track is not of sufficient length to hold the trains. I can cite you an instance where you have two trains going north and you have one coming south—freight trains. The south bound freight train has possibly backed in on the siding, and the other two are standing on the main line. This train has to back out, and you have to make a double "saw" in there to get that passenger train out. In a case of that kind, you have absolutely got to have one man back flagging. We will take for illustration, the north bound train, No. 105; it may be late. You haven't got anything upon her. Maybe you are going to meet No. 103 at Plummerville. You have a flag out south of there towards Menifee, your next move is, when you do that, to get to the swing man and say, "Go back and take charge of the rear end, I am going up ahead." If you didn't have that swing man, you would have to leave that rear end in charge of nobody.

Q. By the swing man, you mean the middle brakeman, or what is commonly called the third brakeman?

A. Yes.

Q. What are your duties when you go into a station where orders are to be received, and where a car or cars are to be picked up, or a car or cars are to be set out?

A. My duty is to go over and superintend the setting out of those cars, or assist, if necessary, in setting them out.

Q. When do you get your orders? What about that, and what are your duties with reference to the orders?

A. My duty, if it is a thirty-one order, after signing for it, is to deliver that in person to the engineer.

Q. That has to be done in person by the conductor to the engineer?

A. Yes. When I do that, then, of course, I will possibly have to get my cars or assist in setting out cars.

178 Q. While you are there getting the orders, and during the time delayed there in going to the engineer and having him read the order to you, what duty is there to be performed by the brakemen that have been left in charge of the train?

A. It is owing to the condition. Take, for instance, a train following you close; he has got to protect that train, the rear man has, and the swing man in a case of that kind inspects your train or cuts a crossing, as the case may be if you pull up and stop. He is used there. Except in a case, of course, where the hind man had to flag—that's something I have always been careful about as on a hillside or rolling track—I would send the swing man back to the rear end and immediately to take charge of it.

Q. Have you, during the six years as freight conductor, found the necessity daily in the operation of trains continuously for three brakemen? Do you find the necessity for three brakemen?

A. Yes.

Q. What can you say about the duties of brakemen with reference to the discovery and repair of hot boxes and journals and to the extent to which that duty calls their attention?

A. I will say that, from practical experience; The argument was made here awhile ago——

Q. (Interrupting.) State what you find to be the fact about it?

A. An old experienced man on the Missouri Pacific or Iron Mountain, brakeman or conductor, who is accustomed to the cars and to work, is very careful the first three or four stops he makes to feel those boxes, to catch them in time to prevent them from getting too far gone. We have numerous boxes that you might walk by and never detect them, that would be getting hot; that is, I mean to be seen. I have known new swing men walk along and look at the cars and never put their hands upon it. I said, "here, if you want to find a hot box, you have to put your hand upon it." He said, "Why"? I said "You will find out. Some boxes have

179 got enough oil to produce a smoke, but some have not. The best way to do and the safest way is to feel of them." The majority, I think, of the old brakemen make a practice of absolutely putting their naked hand on those boxes. That is, I don't say they do that every time they stop, but as a usual thing, starting out, take three or four different stops; take from here, for instance, there is a tank at Palarm, one at Gleason, and one at Germantown. When you get up as far as Germantown, or Russellville, coming south, and you have not discovered a hot box, as a matter of fact you are satisfied that your train is in very good condition; you might not be so careful to feel of every box after that.

Q. In the operation of trains, what is the result of a hot box, if it is not attended to?

A. If you have got a hot box you are likely to burn off the journal and wreck that train.

Q. Burning off the journal is the immediate and probable result of a hot box?

A. Yes.

Q. What is the result of a burning off of the journal?

A. A wreck, and possibly injuring or killing somebody.

Q. Then, is this inspection that you speak of, putting the hand on the boxes, necessary to prevent the heating of the boxes?

A. It is necessary to discover it.

Q. I mean, to discover it. Is it necessary to discover it in order to prevent the burning off of the journal?

A. Yes.

Q. It is necessary to prevent the burning off of the journal to prevent these wrecks?

A. Yes.

Q. Now, with the train the way you now operate them, can two brakemen properly inspect those boxes in order to prevent the wrecks that result from the burning off of the journals?

180 A. It is owing to the length of time. They could stay there a longer time and do it.

Q. I am speaking of the time given to them?

A. No.

Q. Is it better to have three men to do that than two?

A. Yes.

Q. Is it necessary to have three men in order for that train to be operated safely to prevent those wrecks?

A. It is necessary for the inspection.

Q. When a box is hot, what is required on the part of the train crew? Do you get it so hot that you have to give it attention at all.

A. Yes. It requires you to examine the brass. An old experienced railroad man can tell whether or not a brass is defective. Some times they will fool you, but most of the time you can tell.

Q. Suppose they find it is defective?

A. They rebrass it.

Q. What do you mean by rebrassing it?

A. They jack the car up, take the old brass out, and place the new brass.

Q. How many men are required to brass a car by the operation now in use?

A. It is owing to the class of car, the capacity of the car.

Q. Take the average car you are now operating?

A. The average car that is now operated, it would take two.

Q. Now, what would they be required to do?

A. It takes two to turn those jack levers. You understand, we have a plain screw jack, and it is quite difficult. In the car repairing terminals, they have hydraulic jacks. We have the old screw jack that we had years ago. Consequently, with an eighty thousand or a hundred thousand capacity car, I dare say, there is not a man in this room that can take the ordinary jack and jack one of them up.

181 Q. From your experience, what do you say about the frequency with which the draw heads are pulled out, requiring a chaining up of the cars? Under your present system, and the trains as you now operate them? When they do occur, what requirement is placed upon the crew in order to repair the brakes?

A. You mean, pulling out the draw bars?

Q. The draw heads?

A. They have to chain the cars.

Q. How many men are required to do that in the day, and how many in the night, and while that is being done, what other things have to be looked after?

A. We have in the day time to chain up the car with two men. At night, three is necessary.

Q. If three be necessary, with two brakemen on your train could you chain the car up and at the same time protect it, as is necessary under the rule, and necessary to protect yourselves and the public?

A. Can two do it? No. I doubt very much, with the cars we have whether the conductor and the head man could go in and chain that car.

Q. The idea is that three brakemen are necessary to chain it up and protect your train as you are attending to it?

A. I mean three persons. Not necessarily brakemen, because the conductor could assist in that case.

Q. I understand that. It would take the conductor and two brakemen to chain it up. The other brakeman would have to be back to protect the train?

A. Yes, that is what I am talking about.

Q. Now, what can you say about the necessity of three brakemen in order to transmit signals for the proper and safe operation of a freight train under the conditions that occur daily in the operation of the train?

182 A. My experience is that they are needed daily to transmit signals safely.

Q. State the conditions that arise and how they are needed, when needed, and the purpose.

A. There are various conditions that arise under which they could be used or absolutely needed. In switching around curves. For instance, I am going to pick up cars. Say for instance, I had a car to pick up, or several cars; there might be a "red ball", delayed car or meat car. I would have forty or fifty cars in my train. I would have to pick that car up next to the caboose. It might be in a bad place. And, while doing that, I would have to protect my train by sending a flag out.

Q. Do those conditions arise daily? or frequently in the operation of trains?

A. Yes. In that case I need a man there very badly to transmit signals to properly back in, maybe on some house track down hill. There is a case where a man has got good use for a third person.

Q. Say whether or not the necessity for a third brakeman is increased by foggy conditions?

A. Yes.

Q. State the conditions?

A. You take from now on. In the weather we are having now, take tomorrow morning, we will have a foggy morning; that is, in all probability. There are plenty of conditions that arise that you need three or four men on a train—the case might be when the conductor is, there, four—to transmit signals. You might be pulling

out a draw bar or chaining up a car or something like that. You have something to do along these lines. It is almost common, daily occurrence, to pull out draw bars. That is an almost daily occurrence on a trip; from one to three. I have pulled out as high as four or five.

(Noon recess.)

183 Q. I wish you would state whether or not, in the operation of freight trains, when you come to a siding where you have to side track for a passing train, the tracks are always clear, or are they sometimes occupied by other cars or other trains?

A. They are sometimes occupied by cars. You mean a passing track?

Q. I mean tracks on which you are required to side in order to clear for another train?

A. Yes.

Q. To what extent has the amount of traffic that is being hauled over the road increased in the last five years, under your observation, in operating freight trains?

A. I judge it has increased about 35 or 40 per cent.

Q. Do you know whether or not the efficiency in the various departments, the mechanical department, the train master's department, and things of that sort, has increased in the last six or eight years, and if so, to what extent?

A. You mean an increased force? Yes.

Q. To what extent?

A. You take, for instance here. In the mechanical department, I believe six or eight years ago we had one Master Mechanic; today we have two. Six or ten years ago, in the district I am working in, we had a Superintendent who had jurisdiction from Coffeyville, Kansas to Alexandria, La. We had one train Master who had jurisdiction from Little Rock to Coffeyville, Kansas. Today we have a Superintendent with jurisdiction from Little Rock to Coffeyville; we have a train master with jurisdiction from Little Rock to Van Buren. We have a train master with jurisdiction from Van Buren to Coffeyville.

Q. You are referring, now, to the Iron Mountain System?

A. Yes, now, of course, this territory south of here has been divided into divisions or districts. We have a superintendent with jurisdiction which reaches from here to McGehee, as well as

184 I remember. Then, I think we have got a superintendent from possibly McGehee to Alexandria; that is a different district. Just how many train masters there are in that locality I could not tell you.

Q. But all of those departments have increased in order to meet the enormous demands, made because of the increased traffic?

A. Yes.

Q. I wish you would state whether or not, in this pulling out of draw heads, where you have to chain the cars together, in the practical operation of trains, they often occur where, in order to get the chain and the things to the place where the repair is to be

made, it is necessary to carry them across ditches, fences and things of that sort?

A. Yes. There are circumstances under which that is necessary.

Q. When that is true, what is the necessity of having three brakemen in order to meet the contingency?

A. In some instances, you might have to go across a bridge or trestle with the train. For instance, that has happened on the railroad where the car would be derailed on the rear end of your trains. You would have a draw bar pulled out ahead of this car, and you could not back over this trestle with your train on account of this derailed car. You would have to couple into this car and chain it up and take it into the next siding and come back and rerail that car. That is a condition that will happen and does happen.

Cross-examination by Mr. WILLIAMS:

Q. You are now conductor on the Central Division?

A. Yes sir.

Q. Where did I understand you to say you had done most of your braking?

A. The majority of my braking was on the Southern Division.

Q. Have you ever worked on any other road?

A. Yes.

185 Q. Where, and in what capacity?

A. Brakeman on the L. & N. Railroad.

Q. Did you work on a local or through freight train?

A. I was on a local. I was an extra man.

Q. You were brakeman on that road?

A. Yes.

Q. You never operated as conductor on that road?

A. No.

Q. Did you have three brakemen?

A. Yes.

Q. At all times?

A. Yes.

Q. Both on the through freight and on the local?

A. I had four brakemen on locals.

Q. You say conditions are different in Arkansas than they are in other States?

A. Yes.

Q. Have you had any opportunity of making any comparisons further than where you ran on the L. & N.?

A. I have had opportunity by conversing with railroad men over the country; working with them on our line.

Q. That is what they tell you?

A. That the conditions are different.

Q. You speak about the difference you refer to as being the matter of setting out cars?

A. Switching.

Q. Is it not a fact that the Central Division, and has for many years, done a very large business in grain shipments from the west that are consigned to Little Rock and Southern points?

A. Not for the last two years, it has not done so much; that is, like it used to.

Q. Prior to that time it did a great deal?

186 A. Yes.

Q. Those trains were through trains exclusively?

A. A great number of them were through trains, and a great many of them had short loads in them.

Q. A great many of them were actually through trains that made no stops or did any business with intermediate points?

A. Some of them.

Q. Have you any idea to what extent?

A. I could not come right at it.

Q. Do you know that a few years ago the Fort Smith road was doing a tremendous business of that kind in shipping grain, both in this country and in Georgia, Alabama, Mississippi, and to the Seaboard, running sometimes as high as ten or twelve trains a day? Those were all through trains?

A. I could not say all of them were.

Q. The great majority of them were?

A. There might have been a majority of them one day, of through trains, and the next day maybe trains of short loads, or combination.

Q. As a general proposition, I will ask you if they were not through trains?

A. I don't know; I could not accurately state that.

Q. Do you know, as a matter of fact, that a good deal of that business now goes over the Rock Island?

A. No, I do not.

Q. The Fort Smith road is still doing some of that business?

A. Yes.

Q. Having through freight trains with consignments of grain?

A. Yes.

Q. I will ask you if it is not also a fact that they have a good many through shipments of coal; that is, going clear from one division to another?

A. There is no through shipment of coal north, as we call

187 it, out of here at all.

Q. Coming this way?

A. We have some from Denning to Little Rock, and some from Spadra.

Q. What is your division point on that road? Do you run clear to Van Buren?

A. Yes. That is known as our district terminal.

Q. Do you haul any through car in the Fort Smith district this way?

A. Above Van Buren? Some.

Q. They are through trains, as far as your road is concerned?

A. A part of it would be, possibly.

Q. Do you know how many of such trains you haul that would be through freight trains? In the sense that you start with a load that you pull into Argenta and don't take on anything in the meantime?

A. There are mighty few trains that don't do some switching at sometime; a lot of picking up, over the district.

Q. What is a "red ball" freight. I believe that is the correct name.

A. It is a high class freight train.

Q. Isn't that a through train?

A. You mean a "red ball" car?

Q. A "Red Ball" train. Do you have a "red ball" train made up of "red ball" freight that goes through?

A. We have handled what we consider "red ball" trains, and had "red ball" short loads in them and switched them out.

Q. Isn't it a fact that the majority of what are called "red ball" trains are through trains in the full sense of that term? That is, carrying them to the end of a division?

A. Yes, they are through freight trains.

Q. When you come to the main line of the Iron Mountain,
188 from Texarkana north, do you know anything about the character of trains that run in that territory?

A. Not from personal knowledge, from going over the road. All I know is from conversation with the employes working it.

Q. Is it a fact that there are a good many trains made up of California fruit, Texas fresh meat, and things of that sort, that are composed, almost exclusively, of refrigerator cars that do not stop anywhere except at water tanks and for passing trains?

A. I think a limited number.

Q. They run some of them every day?

A. I could not say they do now. They do in the spring and summer.

Q. They don't stop for orders?

A. Yes.

Q. Don't they simply take their orders on the wing, as it were?

A. Sometime they might take a nineteen order, but a great many of them get a thirty-one order, I suppose.

Q. What is a nineteen order?

A. An order that is addressed to the operator, repeated to the operator and delivered by him to the conductor and engineer.

Q. They take that as they go by?

A. Yes.

Q. They don't stop at all?

A. No.

Q. That meat train has precedence over anything on the road except passengers?

A. Under some conditions it does.

Q. I mean, under normal conditions?

A. Yes, of course, it depends upon what direction it is going in.

Q. Suppose you had a trainload of fresh meat at Texar-
189 kana, iced there and turned over to the freight crew, consigned to Memphis. That train would make no stops between Texarkana and Little Rock except for orders or water?

A. It would be a peculiar circumstance if the train could come

from Texarkana to Little Rock and not stop for anything but water or orders.

Q. Well, passing trains. Orders, of course, including passing trains? In other words, do they do any work between those two points?

A. It could be possible.

Q. Don't you know they do that, especially in the spring and summer, almost every day?

A. A limited number of them would. A limited number of trains. I could not say how many. But there can't be anything like a majority.

Q. They do run such trains as that, and some seasons of the year they run one or more of them every day?

A. I could not say positively that they do.

Q. All I understand you to say is, such trains do run, but to what extent you could not say?

A. No, I could not.

Q. For a train of that sort on the road, making only such stops as are necessary for passing other trains, taking water and fuel, your brakemen would have very little to do?

A. I could not say that they would have as much to do as they would on a train switching; still, at the same time there is plenty of business there to keep them busy.

Q. What would the brakemen have to do on a train of that sort?

A. Those kind of trains would bear very close inspection.

Q. You would inspect them while you were stopping for water?

A. You might.

Q. If you were running that way, where else would you
190 inspect them, unless you stopped for water or coal or passing some other train?

A. That's the only opportunity you would have.

Q. You wouldn't have any of the ordinary work to do about the yards? or about cutting out or taking in cars, or things of that sort that you have been explaining here to the court? That's a fact?

A. On a train of that class? If it was a train of that class, a through freight with periodical stops, I suppose they would not have much to do. I don't say they would not, but it is supposed they would not.

Q. The supposition is you would not have much to do?

A. Yes.

Q. Your experience as a conductor, as I understand, has been altogether with three brakemen?

A. Yes.

Q. And has been on the Fort Smith road?

A. Yes.

Q. Is it not a fact since the improvement in the appliances you speak of, the grades of the roads have also been materially reduced?

A. There have been reductions made over some portions of the line?

Q. Is it not a fact that the Fort Smith road has had a complete overhauling as to its grades?

A. Not all of it.

Q. What part of it was not?

A. There are a great many places that were not touched, so far as the grade line was concerned.

Q. Wasn't the whole line reduced from the old grade to the new grade?

A. No.

Q. How much?

191 A. I could not give the miles, because I don't know.

Q. There were places in the old road that didn't need any thing? Isn't that a fact?

A. I presume that wasn't considered so, still there are grades there yet.

Q. Wasn't all of the heaviest grades taken out of the road within the last five years?

A. Yes.

Q. And a great deal of money was spent in rebuilding that road and reducing the grade?

A. Yes.

Q. And, a detour made in many instances in order to get better grades?

A. Yes.

Q. Now, in regard to this drawbar business, where is the drawbar most likely to pull out? What part of the train?

A. There is a difference of opinion. You could not describe that accurately. Often a drawbar is pulled out by the poor management in the handling of air, or in an inexperienced engineer handling the air. He pulls out a great many drawbars and a great many drawbars are pulled out of trains on stopping at water tanks or stations. There is no specified place that a drawbar will pull out. It is likely to be right next to the engine or three cars from the caboose.

Q. Doesn't your experience show that it occurs in some part of the train more than it does in another?

A. No, I don't know that I can say that.

Q. Have you ever observed that particularly?

A. No. I have had as many drawbars to pull out on the head end of a train as I have had on the rear or middle.

Q. As I understand, you never made sufficient observation to be able to state?

192 A. A man would have to make a study to come up and say that he had. He would have to keep a memorandum of them, put them down in his book, so as to figure up in the book as to the location in the train in order to answer that.

Q. In regard to these draw bars, isn't it the custom to throw them out to one side and let the section men pick them up and bring them in?

A. Sometimes they pull out in places that it is absolutely impossible to load one of them.

Q. As a general rule, don't you throw them to one side, and let the section men bring them in?

A. A good many times.

Q. You still don't answer. I asked if it is not the usual custom and practice to do that?

A. I could not answer that, because I don't know.

Q. You can answer from your own experience. Isn't it your custom?

A. I will say this, on account of being on a hill or something like that, and we have no empty car to put them in, it might be possible we would leave more of them to be picked up than we take up.

Q. Did I understand you in your direct examination to undertake to state anything like an average of how many you pulled out in the course of a month, say?

A. I said this, as well as I remember, that there is seldom a trip made that there wasn't but one draw bar to pull out, and I have had as high as three and four in one trip to pull out.

Q. Do you mean to say you don't make a round trip without pulling a draw bar out?

A. I have made very few.

Q. How many trips do you make in the course of a month?

A. That would have to be approximated. Sometimes we lay here two or three days, and don't get out of Van Buren for thirty-
193 six hours. You mean a round trip? or one trip each way? I am trying to get your trips with reference to the draw bars. Do you mean to say you never make a straight trip without pulling out a draw bar?

A. Seldom.

Q. Then, how many straight trips do you make in a month?

A. I should say possibly eighteen or twenty.

Q. Then, you think you would pull out eighteen or twenty draw bars in a month?

A. Yes.

Q. How many other conductors on the division on the run make as many runs as you make?

A. There would be possibly ten or twelve, or more, or fifteen.

Q. Then, you think the Central Division would average two hundred draw bars a month pulling out?

A. Almost.

Q. Now, that is only between Van Buren and Little Rock?

A. Yes.

Q. That would be an average of two hundred draw bars a month pulling out?

A. Yes.

Q. Where are those draw bars brought when they are brought in?

A. Brought?

Q. Somebody brings them in somewhere?

A. They are brought in and lay out there for a long time.

Q. That don't answer my question. Where are they brought if they are brought? Do you carry them to Van Buren, Baring Cross, Coffeyville or where?

A. Sometimes I suppose they go to Van Buren. I don't know, but I think a great many times they go to Van Buren.

Q. On the runs you make they would go to one or the other; Either Baring Cross or Van Buren?

A. Yes; sometimes we pull a draw bar very near out. I
194 had a case the other day. We could not get the draw bar out on account of the draught timbers without taking the rigging down. We doubled chained them cars and brought it in. We do that often. What I mean by double-chaining is to put it through the draught timbers, the dead wood, and the draw bar lifter and double-chain it to the other car to hold it in, and pull it that way. We have cases of that kind.

Q. The draw bar is not out in that case?

A. It is impaired so that it won't pull, still it is not altogether out.

Q. How many times does that happen?

A. That doesn't happen so very often.

Q. Have you ever observed which end of the car the draw bar is likely to pull out of? Is there any difference in that?

The COURT: The front end or hind end?

A. No.

Q. Do you sometimes detach the car that the draw bar is drawn out of and carry it to the nearest station, and then go back and get your train?

A. Sometimes.

Q. How often do you do that?

A. That would be owing to conditions. That is, I would say that doesn't happen always. It might happen when you don't have any chain. When we have a draw bar to pull out in that case, we would have to take that car to the first siding and set it out.

Q. You don't know how often that occurs?

A. No.

Q. How many men does it take to chain up a car?

A. In some instances, it will take two; in some instances, three.

Q. What is the difference?

A. There are different kinds of cars different makes of cars.
195 At night you need some one to hold the light.

Q. You all have lights?

A. Yes, but you understand this: A man cannot handle the car chain and lamp all at the same time.

Q. Isn't it a fact that no more than two men can work in chaining up a car at the same time?

A. No.

Q. In speaking of your hot boxes a moment ago, do I understand you to say that your brakemen will inspect those by putting his hands upon all of the boxes?

A. Yes.

Q. They do that all the time?

A. As I explained awhile ago, I don't claim they do that at every stop, but I do claim that a practical Iron Mountain brakeman who knows his business will, for the first two or three tanks or stops, as the case might be, feel his boxes with his naked hand.

Q. One on one side and one on the other?

A. Yes.

Q. Two men usually do that?

A. Sometimes at an ordinary stop they don't have time. The swing man will probably go up eight or ten cars, as the case might be, and turn back towards the engine, and the hind man will go down on one side, and the swing man on the other side. That's the way they usually inspect them.

Q. What are you doing while your engine is taking water?

A. It is owing to where my duties call me. If they find a hot box, they will halloo and say, "Here is one warm", and the chances are I will go and help pack the box, and say, "You go ahead and look at the other cars." That happens often.

Q. There is nothing to prevent you from engaging in that inspection when you stop for coal or water?

A. Yes, there is.

196 Q. What is it?

A. Often our water tanks are at telegraph offices and we go up there and find an order board out. Our duties call us to the office to get orders.

Q. You don't take an order until that train goes out?

A. Until it goes out?

Q. Getting your orders is the last thing you do there?

A. Not necessarily so.

Q. Don't your rules prescribe that?

A. No.

Q. That you are to go there for orders before leaving?

A. Not necessarily so.

Q. You report to the telegraph office as soon as you go in?

A. Yes.

Q. Now, isn't it the last thing before leaving for you to inquire of the operator whether he has any orders?

A. If the board wasn't out indicating orders, or unless I wanted to find out or get some time on a passenger train, I possibly would not ask him anything about orders.

Q. What is the custom about getting your orders if you are delayed at stations?

A. There are conditions in practical railroading, of course, that you go back to the office. If you were delayed—you might be putting in a brass or find a draw bar out—and you had a meeting order with some train somewhere else, of course, you must be governed by conditions.

Q. Rule 364 says that brakemen are positively forbidden to go to meals or delay the train for any cause after receiving orders which allows them to proceed, without permission from the division superintendent or train master. After you receive your orders, isn't it your business to go on with your train?

A. It is my business to go on provided I can proceed.

197 Q. Do you get an order to proceed until you can proceed?

A. That's true.

Q. Isn't that what that order is?

A. When I get that order and go to my engine or train, something may intervene there that I can't get out.

Q. You would wait for that intervention to be over? Then, wouldn't you go back and get another order?

A. It would be owing to how long the intervention would be.

Q. If it was any appreciable time?

A. Twenty, twenty-five, thirty or forty minutes, as a matter of fact, if I had a meeting order for a train somewhere, I would go if it was fifty or sixty miles, and I had meeting orders fifty miles from here, or from Argenta, in a case of that kind; if I had an order at Palarm that I would meet a train at Russellville, I would call it very silly in me to go back to that office to find out about orders.

Q. We were talking about your stopping at a water tank for water. If you had to stop only for water at a telegraph station, would you go there to see if he had orders?

A. If the board was out?

Q If the board was out, you would stop without regard to water?

A. Yes.

Q. I am talking about your stopping for water. Your board had nothing to do with that?

A. No.

Q. Now, then, when you stop for water and nothing else, and your engineer stops to replenish your train, your board has nothing to do with that?

A. No.

Q. Then, you would not go to the telegraph office at all?

A. Not unless I had business.

198 Q. What other business could you have?

A. I might want to send a message.

Q. If that was all there was about it you could drop the message off as you went by?

A. That's true.

Q. Now, would you neglect any such matter as inspecting your train to walk up to the head of the train or telegraph office simply to give a message that you could drop off as you went by?

A. It is natural to suppose if I had something to call me over there, I would look at my train as I went along.

Q. When your train stops for water, there is nothing to prevent you engaging in inspecting your train, under ordinary conditions?

A. I might be engaged in something else.

Q. I am talking about an ordinary experience, when your train stops for water, not for orders. Ordinarily, there is nothing to prevent you from engaging in inspecting this train?

A. In some instances, there would not be.

Q. You still don't answer my question. I say, according to ordinary experience, in your ordinary experience, there would be nothing to prevent you from doing it?

A. There are times that there would not be.

Q. You are recognized as a good conductor and an intelligent man. As a matter of fact, don't you know that under such circumstances you make it your habit to inspect your train?

A. Sometimes I do.
Q. Generally don't you do it?
A. I am out there a good deal.
Q. You might as well be frank and state whether you do or not. There is no use in evading my question.
A. Understand this, Mr. Williams, it is not the common practice for the conductor — the same as the brakeman. That is what
199 I mean. He does not inspect as regularly as the brakemen.
Q. What you mean to say is, there may be circumstances which will prevent you from doing it?
A. Yes.
Q. Now, you are required by the rules yourself to make frequent inspections of the train?
A. When the conditions justify it.
Q. I will read the rule: "Conductors must examine their train whenever they have an opportunity to do so, particularly when entering or leaving siding, or waiting for other trains." Do you observe that rule.
A. Yes; I endeavor to do so.

Redirect examination by Mr. RHOTON:

Q. Mr. Pearsall, first class trains are superior to second class in the operation of them?
A. Yes.
Q. Trains of second class, of course, are superior to trains of the third class?
A. Yes.
Q. Are ex. trains inferior to all trains?
A. All other classes? Yes.
Q. State whether or not, there are a good many extra trains run in the operation of the road generally in Arkansas? Do they run a good many extra trains?
A. I can say from experience on the railroad I am working for, I haven't seen a card train, outside of a local and passenger until right recently, for I think possibly forty-five or sixty days.
Q. What do you mean by a "card train"?
A. Running them all extra except local and passengers.
Q. That may be the abnormal conditions of things, but taking the normal condition of things, do they run a good many extra trains?
200 A. Yes.
Q. I mean extra freight trains?
A. Yes.
Q. Now, trains in the direction that is specified in the time table are superior to all trains running in the opposite direction?
A. Of the same class? Yes.
Q. Since the air brakes and automatic couplers have come into existence, state whether or not the roads have taken off the inspectors that they formerly had at the intermediate stations?
A. I can speak of my own district from here to Van Buren.

Q. What about it there?

A. You mean before this Interstate Commerce law went into ffect? About that time, that is, since, rather, or awhile after that, e used to have a car inspector at a place called Coal Hill, and he elped inspect our trains; that is, he assisted us sometimes in pack- ig hot boxes, trains going through there. In addition to that, this ar inspector inspected the cars that came out of the mines there, nd that was in addition to inspecting the trains through there. But, t the present time, for the last few years, you understand that coal ining district has changed to a place near Denning Yard.

Q. Has the inspector been removed so far as inspecting the trains concerned; that is, through trains?

A. This inspector at Denning yards does not inspect any trains assing through Denning.

Q. He is no assistance to the brakemen or crew in inspecting rough trains?

A. No.

Q. With the automatic coupler, state whether or not the presence f the brakeman or somebody is necessary at each coupling?

A. When you are making a coupling? Yes.

Q. What does he have to do?

01 A. He has got to see that the coupling is properly made. You understand that today in a train of thirty or forty cars, here are different kinds of couplers. They are not uniform at all. here are times when they will close up and look like it is coupled; will deceive you, when you think it has coupled.

Q. I want to know if his presence there is necessary?

A. He is there for two purposes. He is there to see that the oupling is made properly, and to couple the air hose.

Q. The air hose has to be coupled by the brakemen?

A. Yes sir.

Q. As he formerly had to couple cars with the link and pin?

A. Yes.

Q. In what condition are the hand brakes kept at present, as ompared with the condition in which they were kept before the r brake was put on?

A. The hand brakes don't receive, in my jurisdiction, the atten- on they did receive prior to the adoption of the automatic air rakes.

Q. How much of the time does a freight conductor, in the ordi- ary operation of a train, spend at or near the engine in the move- ent of a train?

A. I am speaking for myself. There are times that I don't hardly de, I don't suppose, sixty miles in the caboose from here to Van uren.

Q. Would that be about what conductors would ordinarily do? o you act about the same as conductors ordinarily act in your posi- on?

A. Yes.

Q. These through trains are partially made up at the terminals? t places like Argenta and Van Buren?

A. Yes.

Q. Are the air couplings always coupled up there? or do
202 the brakemen on the trains have to look after that coupling and couple up such as have been omitted?

A. The brakemen couple up the air hose.

Q. In common experience, do they have to do a good deal of that in freight trains?

A. Yes.

Recross-examination by Mr. WILLIAMS:

Q. Do I understand you to say that the brakemen have to couple up all the cars?

A. Yes. I will qualify it by making this statement: Sometimes a train might come in here from the Valley or south end of the track, and there might be three cars that went west; that is what we call "north," over our line. In switching that train in the Iron Mountain yards it might be it was never uncoupled at all. There are conditions that you find two or three cars coupled up sometimes in your train, but ordinarily they have been cut between every car, and ordinarily, I would say, under ordinary conditions, you couple up all the air hose.

Q. Are you acquainted with the fact that that is not the rule on the Rock Island?

A. No.

Q. And that that is done by the yard crew?

A. No, I do not.

Thereupon, to facilitate the hearing of this case, the following agreements were made between counsel for the State and Counsel for the defendant:

203 *Agreement of Counsel.*

For the purpose of expediting the matter, it was here agreed by and between counsel for the State and for the defendant that R. Kramer, F. M. Schultz, W. W. Dunn, R. R. Cook and E. E. Horner, all of whom are now in active service as freight conductors on the Chicago, Rock Island & Pacific Railway Company in Arkansas, the defendant in this case, would, if placed upon the stand, testify to the same state of facts as have been testified — and express the same opinions as expressed by W. C. Turner and W. E. Pearsall, whose testimony is hereinbefore set forth, except that they would testify that on the Rock Island road they have been operating with two brakemen instead of three.

And it is further agreed that C. H. Terrill, W. G. Walsh, J. M. Mitchell and G. W. Anderson, who are now and have been in the active service of the St. Louis, Iron Mountain & Southern Railway Company as freight conductors, would, if placed upon the stand, testify to the same state of facts as have been testified to, and express the same opinions as have been expressed, by W. C. Turner and W. E. Pearsall, whose testimony is hereinbefore set forth.

And it was further agreed that J. W. Holbrook, who is now in the

service, and has been in the service, as freight brakeman on the Chicago, Rock Island and Pacific Railway, would testify to the same state of facts as was testified to, and express the same opinions as was expressed by W. C. Turner and W. E. Pearsall, whose testimony is herein before set forth, except that he would state that in the operation of the Rock Island Freight trains and through trains only two brakemen have been employed.

Thereupon the State, through its counsel, rested.

204 The defendant, to further maintain the issues in its behalf, introduced the following witnesses, to-wit:

W. T. Tyler Recalled—Testimony.

W. T. TYLER, being recalled by defendant, testified as follows:

Examined by Mr. T. S. BUZBEE:

Q. What has been your observation as to the increase or decrease in the number of cars in freight trains generally since the adoption of the air brakes and automatic couplers as compared with the time before their adoption?

A. As a general rule, there has not been an increase on roads that I have been connected with, and that is quite a number. I arrive at that conclusion from the fact that the average number of cars hauled for a freight train mile is one of the important and vital statistics of railroad operation, as it is included in the annual report of each and every railroad. Prior to about 1890 it was really the operating statistics, the statistics upon which was based the question of the efficiency of the operation of a division. After that time, the ton mile basis was reached, but even now each annual report and each monthly operating statement includes those figures, and they are about the same now as they were ten or fifteen years ago. The increase in ton-age per train, due to the larger engines, has been provided for, or caused by the increased capacity of the cars, both the large capacity of the car and the large capacity of the engine being made necessary by the growth of traffic. But the average number of cars per train has not materially increased, if it has in fact increased; the average number of cars per train mile on railroads throughout the west, those I have been connected with and those I have seen reports of.

Q. The method of inspection on the different roads have been testified to. What is your observation, and what is the fact on the railroads generally in Arkansas, with reference to the inspections of trains now as compared with former times?

205 A. The inspection made at terminals by regularly employed car inspectors is very much more rigid than it formerly was. There are more inspectors employed at terminals. That is made necessary by the safety appliance law and the orders of the Interstate Commerce Commission. It is necessary now that cars be very much more closely inspected than they were formerly to avoid having to go out in trains with the safety appliances defective.

I think perhaps the force of car inspectors has been more than doubled, I should say, in the terminals within the State of Arkansas, with which I am familiar.

Q. It has been testified that conditions in reference to switching are different in Arkansas than in other States surrounding Arkansas. You testified in chief that you have been employed on various roads in Missouri, Arkansas, Oklahoma, Texas and Louisiana, I believe. Now, what are the conditions in reference to switching on through trains in Arkansas as compared to those territories?

A. I should say that there is less local business in Arkansas than in the other States named. Some parts of the Iron Mountain Road in the extreme southern part of Arkansas have quite a number of sawmills where the local loading amounts to considerable. The work at those mills is done by local trains ordinarily, and where one local train does not accomplish it a switch train is usually run. And that is true on the Frisco line, with which I am connected. The local loading at the mills is taken care of to a very great extent by the local trains, while in the mining districts there is usually switch engines employed. We have quite a number of mines in Arkansas, and in all of those points we employ switch engines. They pull the loads out of the mines and place the empties; they concentrate the loads at one station: a train of empties is run out from the terminal to that station, the empty cars are set out and these, deads picked up into solid trains. The other States you named, as, for instance, Oklahoma, is an agricultural State. A great
206 many of the towns have elevators, and I should say that the average local loading at the local stations is very much heavier in those States than it is in Arkansas. There are vast stretches of track in Arkansas where there is practically no local loading at all. We have considerable of it. We have districts of 125 miles where the local loading will not amount to 25 cars per day on that entire hundred and twenty-five miles of railroad. It is very seldom you find that condition in other States, because of the agricultural products and the grain that comes out of the elevators.

Q. You have heard the discussion in reference to the necessities arising for the use of third brakemen on the Iron Mountain road. Will you state your experience and observation on the Iron Mountain road and on the other roads with which you have been connected in the State of Arkansas, and these other places in reference to the happening of accidents as between the Iron Mountain road, which uses three brakemen, and the other roads which use but two brakemen?

A. I was connected with the Iron Mountain for about five years during all of which time three brakemen were used on through freight trains. Since then, I have been connected with the Frisco where two brakemen were used, and I never saw any difference in the matter of the safe handling of through trains, in the matter of accidents to freight trains, or delay to freight trains. Our operation on the Frisco road with two brakemen is, in fact, better today than the operation was on the Iron Mountain during the time I was with it with three brakemen. I will say that candidly. And my expe-

rience has been the same on other roads before I came to the Iron Mountain. I never worked for a road, as I stated before, that had three brakemen, and I never knew of an accident occurring that might have been prevented had there been three brakemen on the train, so far as I can remember. My observation has been that the operation of a train with two brakemen is fully as safe as with three, and I think it is borne out. I base my statement, not only on
207 my own experience, but on the reports of those roads.

Q. How do your trainmen inspect cars, or inspect their trains?

A. Our rules on the matter of train inspection are substantially the same as other roads. We require the conductor to inspect his train when he can do so, and we expect him to make that inspection; we prefer that he make it, when pulling in and out of side tracks. We regard it as the best method of inspection, because he has a better opportunity to observe anything wrong with the running gear of the train when in motion that he has with the train standing still. We also expect the brakemen, and the conductor, for that matter, to walk by the train when it is standing on the side track waiting to meet trains. The rule only requires that the train men do that whenever they have an opportunity to do it. It does not mean they shall neglect any other duty, neglect to flag, or neglect their work, for the purpose of inspecting that train. If they have any reason to believe that there is anything the matter with the running gear, we expect them to stop and stand there, regardless of how long it may take, until they give it a careful examination. We have met cases of train men finding a broken flange in that way.

Q. Do you find that the conductor with two brakemen are sufficient to do that in the practical operation of trains on these roads?

A. Yes. It has reference to the inspection for hot boxes, which, I presume, belongs there, but was not included in the question. For inspecting hot boxes we don't require that the trainmen go along and feel of all the boxes. We don't regard it as necessary, or as even perhaps the best method. A hot box will make itself known to the sense of smell, or if a man is standing beside a train, the train pulling in or out of a side track, if the box is not lubricated, has no oil in it, you can hear it as it goes by; it makes a rather screeching sound.

Q. Are you familiar with the method of chaining up draw bars, and have you engaged in that work?
208 A. Yes, I have.

Q. How many men does it take to accomplish that?

A. One man can chain up a draw bar; chain up a car.

Q. Do you know that?

A. Yes, I do know it. One man can do it, and he can do it without any very great length of time to do it in.

Q. Will you explain how it is done?

A. It is done ordinarily by placing the level end of the chain in the coupler of the car and that is coupled, backing it against the other car, passing the other end of the chain between the cut bolster and the transom around the center beam, passing it entirely around

there, and back into a hook at the proper point in the chain. The hook is a grab hook.

Q. You have heard the testimony on both sides. If there is anything else that you think needs explaining in the matter, that occurs to you, I will ask you just to state it to save time.

A. I heard the statement made that it would take six brakemen now to handle the present train by the hand brakes. Now, my experience in braking covered something like about five years. I broke on the Great Northern road where the trains were controlled entirely by hand. I will say in those trains, not only the number of cars, but the ton-age of those trains, was greater than is hauled ordinarily in Arkansas, or on any road I know of. Our trains consisted of forty-five cars of wheat, and a car load of grain on our roads at that time was from forty thousand to sixty thousand capacity. They are loaded to the load limit, which is ten per cent above the capacity of the car. I have seen frequently 1800 tons in a train, and two brakemen handled those trains, and we handled them safely. In that length of time as brakeman I never was in an accident. Another thing that occurs to me is, in those days we not only used one engine, but we used two. We used double headers. If one engine would not haul forty-five cars of grain, two would. They are hauling approximately the same trains on that road today that they were then, and they are hauling them with about
209 90 per cent air brake.

Q. Those cars you were able to handle then successfully and safely with two brakemen, you being one of the brakemen?

A. Yes.

Q. Does your road require the drawheads to be brought in to terminals by the train men?

A. No, that rule is an obsolete rule. That rule came down from the time when we used the pin and link drawbar, and the attachment then was a spindle, the spindle going through the back end of the drawbar, and was placed behind the spring. The draw bar weighed about one hundred to one hundred and fifty pounds, I think, depending on the style of the drawbar, and it wasn't a very serious task to load that drawbar up. In fact it wasn't a very great task to put it back in the car, but, since the adoption of the automatic coupler, they are too heavy to handle, and ordinarily, or at least very often, when they do pull out, they bring the draught timbers with them, and we don't require that they be loaded. During the last two or three years, or during all the time I was with the Iron Mountain they were not required to be loaded. We have them picked up by the section men and brought to the section man's headquarters at the round house and loaded up on the scrap pile.

Q. Are you familiar with the rules of the Rock Island and the Frisco in reference to whether or not they require the men to couple the air on leaving terminals?

A. With the Frisco. I am not with the Rock Island. With the Frisco we don't require it. We have men at the terminals to couple the air brakes and to inspect the air. The brakemen were relieved of that something over a year ago. Ordinarily we have pipes placed

through the train yards so that the air brakes can be connected up and charged with air from the air compressor located in the yards, and tested before the engine backs on the train. Then, when the engine backs on there is another test made, and that is made also by the air brake inspector who is located there for that purpose.

Q. So then when the train men take the train they are ready to go?

A. Yes.

Cross-examination by Mr. RHOTON:

Q. When you came to the Iron Mountain, how many freight cars per train were they hauling?

A. The first freight train I rode on on the Iron Mountain road was from Poplar Bluff to Little Rock. I remember the occurrence distinctly; it had sixty five cars. It was a merchandise train, known at that time, I think, as No. 87, corresponding now to what is called the "red Ball" train. It was a fast merchandise train and had sixty five cars in it. I remember the occurrence very well, because I had with me Mr. Waters, and the train broke in two in the air, a short distance above Newport, and gave us one of those experiences that was recited by one of the witnesses this morning. It was very much like a collision.

Q. I am not speaking of any particular train, but what was the average number of cars per freight train hauled on the Central Division when you came to the road?

A. The Central Division at that time had approximately a two per cent grade line, and the number of cars hauled, I think, ranged from fifteen to twenty possibly, or 18 cars. Since that time that grade line has been reduced.

Q. How many cars per train were they hauling on that division when you left the system?

A. I think about forty.

Q. It had more than doubled?

A. No, it had not doubled.

Q. Approximately it had doubled?

A. Just a minute and I will tell you. I think, if I remember correctly, the ton-age hauled over the old line before the grade reduction was about 900 tons, and the ton-age hauled when I left the Iron Mountain, or at least when I relinquished supervision over that particular territory, the Central Division, was, as I remember it, either fourteen hundred or fifteen hundred tons; I think fourteen hundred tons.

Q. Do the switch engines make up the through trains at these coal mines and saw mills and things of that sort?

A. Not at sawmills. But at coal mines, our practice is to switch all of the coal together so that the outgoing train has only to back onto it and pick it up. There will be some cases where it is necessary to set the air brakes of the car behind, but those are remote cases and are due to someone's oversight.

Q. Do you think the brakemen can inspect the boxes by simply standing and watching the train as it pulls out of a siding?

A. Yes. I think it is the proper way to inspect the boxes, and I will say, furthermore, that it is the only way I ever saw a box inspected, and I will say to you that I never inspected a box in my life by going along and putting my hands upon it. I never regarded it as necessary.

Q. That is, at least, it wasn't your way of inspecting?

A. No. I never saw it done.

Q. You never saw it done. How can you figure out the efficiency of it? Do you mean to say that a man could just stand there as the train was running out and get a better idea of how a box was than he could to actually go along and feel of it? Do you mean that?

A. He would get just as good an idea. Then the length of time it would require him to walk the length of his train and place his hand on each box would not be justified as against simply standing there as the train was pulling by him, or walking by the train and noticing the boxes; it would not be justified by any benefit that would be derived by that method as against the other.

212 Q. Are the general rules you have for the operation of the Frisco about the same as the Iron Mountain and the Rock Island?

A. I think they are. They are very much the same on all roads within the southern district.

Q. The road with which you are now connected is affected by this law requiring three brakemen?

A. I think it is.

Q. How many cars did you say you operated in trains when you were braking on the Great Northern, or where you were braking?

A. Forty-five loaded cars was a train.

Q. It was then equipped with hand brakes?

A. Yes.

Q. You say you rarely got in to an accident?

A. I never had an accident while I was braking. That is, an accident due to——

Q. (Interrupting.) With the present system of air brakes, they often have accidents?

A. Yes.

Q. Then really the adoption of the air brake system has not reduced the danger of accidents?

A. The number of trains operated has had some influence on that, no doubt; running more trains, possibly running at a greater speed; coming into stations faster. The stopping of trains by hand brake was possibly a little slower, but ordinarily no chances were taken about coming into stations whatever. We slowed down the train at the proper point, and kept it within control. I don't know that that is altogether an explanation of that fact, but it is a fact, nevertheless, that we did not have as many train accidents ten years ago on railroads per mile run by freight trains as we do now.

Q. Isn't it a fact that the statistics show that the number of accidents are increasing every year, I mean increasing in proportion

to the amount of business handled. Don't these statistics show a rapid increase in the number killed and injured in accidents?

213 A. As compared with the perfect handling, I am not so sure that's true. I don't know. I am not posted on that.

Q. Is it not true that because of the greater number of trains being run and the greater speed at which they are run makes it necessary that greater caution should be exercised in the operation of trains than formerly when they ran fewer trains and ran slower?

A. Greater facilities are furnished to accomplish that. The air brake is necessary and would be necessary under the present conditions to the perfect handling of trains over some single track lines.

Agreement of Counsel.

214 It was agreed by and between counsel for the State and the defense that W. M. Whittenten, W. J. McKee, J. M. Walsh, W. O'Brien, Mr. Sneddiker, J. W. Dean, and A. E. Walker would, if placed upon the stand, testify to the same state of facts as havd been testified, and express the same opinion as have been expressed, by W. T. Tyler in rebuttal, whose testimony is hereinbefore immediately set forth, with the exception that those of said witnesses who are employed on the St. Louis, Iron Mountain & Southern Railway Company would testify that they use three brakemen.

It was further agreed that Mr. J. M. Walsh's statement in regard to the average number of drawheads that are pulled out a month on his (Central) division, that is, from Van Buren to Little Rock, the same as Mr. W. E. Pearsall's division, shall be incorporated in the record as testimony on behalf of the defense.

It is further agreed that on the Chicago, Rock Island and Pacific Railway Company system, about the pulling of drawbars, that there is a bulletin rule to the effect that they are not to be loaded by the train crew.

It is further agreed that the defendant is a foreign corporation which came into the State of Arkansas on the 24th day of March, 1904, and complied with the laws of the State of Arkansas prescribing the terms and conditions under which foreign railroad corporations are permitted to do business in said State.

The defendant thereupon, through its counsel rested.

215 It was agreed by and between counsel for the State and for the defendant that the following rules, from the book of rules of the Chicago, Rock Island & Pacific Railway Company shall be considered in evidence:

Signal Rules.

11. A fusee on or near the track burning red must not be passed until burned out.

When burning green it is a cautious signal.

12. Hand, Flag, and Lamp Signals.

(*a*) Swung across track..... Stop.
(*b*) Raised and lowered vertically..... Proceed.
(*c*) Swung vertically in a circle at half arm's length across the track when the train is standing..... Back.
(*d*) Swung vertically in a circle at arm's length across the track when the train is running..... Train has parted.
(*e*) Swung horizontally at arm's length above the head, when train is standing..... Apply air brakes.
(*f*) Held at arm's length above the head, when train is standing..... Release air brakes.

14. Audible Signals.

Engine Steam Whistle Signals:

NOTE.—The Signals prescribed are illustrated by "O" for short sounds; "—" for longer sounds. The sound of the whistle should be distinct, with intensity and duration proportionate to the distance signal is to be conveyed.

Sound.		Indication.
(*a*)	o Stop.	Apply Brakes.
(*b*)	— —	Release brakes.
(*c*)	— OOO	Flagman go back and protect rear of train.
(*d*)	— — — —	Flagman return from west or south on main line.
(*e*)	— — — — —	Flagman return from east or north on Main line.
(*f*)	— — — — o	Flagman return from west or north on branch or auxiliary line.
(*g*)	— — — — — oo	Flagman return from east or north on branch of auxiliary line.

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(*h*)	— — —	When running train parted; to be repeated until answered by the signal prescribed by Rule 12 (*d*) Answer to 12 (*d*).
(*j*)	o o	Answer to signal not otherwise provided for. Also to be given by engineman after the station whistle to indicate to the train crew that train orders to be executed at that station have not been forgotten.

(*k*) o o o	When train is standing, back. Answer to 12 (*c*) and 16 (*c*).
(*l*) o o o o	Call for signals.
(*m*) — — o o	To call the attention of trains of the same or inferior class to signals displayed for a following section.
(*n*) — — o o	Approaching public crossing at grade and obscure places.
(*p*) ———	Approaching stations, mail cranes, junctions and railroad crossings at grade.
(*o*) oo ooo	To be given by engineman to call attention of the train crew to a 19 train order signal displayed, and as acknowledgement to operator that signal has been seen.
(*r*) — o	Warning to passing train on another track, of danger, or that it is following another train too closely. To be given by the enginemen on sidings or on double track.

A succession of short sounds of the train whistle is an alarm for persons or stock on the track, and calls the attention to train men to danger ahead.

Should a train on single track or at end of double track fail to answer whistle signal as provided in 14 (*m*) the train displaying the signals will stop at once and not proceed until the signals are acknowledged, and will report the facts to the Superintendent or chief dispatcher from the first open telegraph station.

Should an engineman fail to sound the signal 14 (*j*) approaching a station where a train order is to be executed the train crew must at once stop the train.

15. The explosion of one torpedo is a signal to stop; the explosion of two, not more than two hundred feet apart, is a signal to reduce speed and lookout for a stop signal.

Movement of Trains.

85. A train must not start until the proper signal is given.

217 88. At meeting points, between trains of the same class the inferior train must clear the main track before the leaving time of the superior train, and must pull into siding when practicable. If necessary to back in, the train must first be protected, as prescribed by rule 99 unless otherwise provided.

a. At meeting points between extra trains, the train in the superior direction will hold the main track unless otherwise directed.

91. Unless some form of block signals is used, trains in the same direction must keep at least ten minutes apart, except in closing up at stations, or at meeting and passing points.

a. The rules relating to keeping trains the required time apart, or the position of fixed signals at stations or junctions, do not relieve train men from observing all rules in regard to the protection of their trains.

99. When a train stops or is delayed under circumstances in which

it may be overtaken by another train, the flagman must go back immediately with stop signals to a point where he can have an unobstructed view of an approaching train for at least one mile, and as much further as is necessary to insure full protection. He must at once place one torpedo on the rail on the engineman's side, and will remain until recalled. When recalled he may return after placing a second torpedo on the rail sixty feet from the first one.

If an approaching train is in sight, or if a passenger train is due within ten minutes he must remain until it has been stopped.

The front of the train must be protected in the same way when necessary by the fireman.

100. When the flagman goes back to protect the rear of his train, the next brakeman must take his place on the train. On passenger trains the baggageman must take the place of the brakeman when necessary.

101. If a train should part, while in motion, train men
218 must, if possible, prevent damage to the detached portion.

The signals prescribed by rule 12 (*d*) and 14 (*h*) must be given and the front portion of the train kept in motion until the detached portion is stopped except that upon trains fully or partially equipped with the air brake, should the engineman feel the brakes go on suddenly, which is an indication that the train has broken in two, he must immediately shut off steam to allow the rear portion to close in against the engine, and not attempt to pull away from the detached portion.

The front portion will then go back, to recover the detached portion, running with caution and following a flagman. The detached portion must not be moved or passed until the front portion comes back.

On double track, the front portion must give the train parted signal to trains running in the opposite direction. A train receiving this signal from a train on the opposite track must stop and then proceed with caution until the detached portion of the train has been passed. When a train breaks down so it may obstruct the opposite track, trains on the opposite track must be stopped.

102. When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

104. Switches must be left in proper position after having been used. Conductors are responsible for the position of the switches used by them and their train men, except where switch tenders are stationed.

A switch must not be left open for a following train, unless in charge of a train man of such train.

a. When a train backs in on a siding to be met or passed by another, the enginemen, when his engine is clear of the main track, must also see that the switch is properly set for the main track; and when pulling into or out of a siding, or other tracks, he must see
219 that switches ahead are properly set.

105. Both conductors and enginemen are responsible for

the safety of their trains and under conditions not provided for by the rules, must take every precaution for their protection.

151. On double track trains must keep to the right unless otherwise provided.

When a train crosses over to, or obstructs the other track, unless otherwise provided, it must first be protected as prescribed by rule 99 in both directions.

A train must not cross over when a superior train is due, except to avoid delay to superior trains following.

In permitting trains to pass after crossing over, preference must be given to the train of greatest importance.

152. Trains must use caution in passing a train receiving or discharging passengers at a station, and must not pass between it and the platform at which the passengers are being received or discharged.

Rules for Movement by Train Orders.

210. Those to whom the order is addressed, except enginemen, must then sign it and the operator having read the order aloud to them, will send their signatures preceded by the number of the order to the chief dispatcher. The response "complete", and the time, with his initials, will then be given by the train dispatcher. Each operator receiving this response will then write on each copy the word "Complete", the time, and his last name in full, and then deliver a copy to each person addressed, except enginemen. The copy for each engineman must be delivered to him personally by the conductor, and the engineman must read it aloud to the conductor before proceeding.

a. Conductors must show all train orders to their flagmen, baggagemen, brakemen and porters, and enginemen to their firemen and head brakemen who are required to read and bear them in mind.

Telegraph Block System.

302. Block signals control the use of the blocks, but unless otherwise provided, do not affect the movement of the trains under the time table or train rules; nor dispense with the use nor the observance of other signals whenever and wherever they may be required.

318. (*a*). (To be used for absolute block for following movements only):

To admit a train to a block the signal man must examine the block record, and if the block is clear, will display the proper signal indicating to the train to be admitted, reporting its movement as per rule 319.

A train must not be admitted to a block unless it is clear, except as provided in rule 331, or by special order.

318. (*b*). (For permissive block for following movements only):

To admit a train to a block the signal man must examine the block record, and if the block is clear, will display the proper signal

indication to the train to be admitted, reporting its movements as per rule 319.

A train must not be admitted to a block which is occupied by a passenger train, except as provided in rule 331, or by special order.

A train may be permitted to follow a freight train into a block under a cautious signal.

Freight Conductors.

707. The Freight Conductor reports to the Train Master.

He must obey the orders of the Yard Master.

He is responsible for the movement, safety, and proper care of his train and for the vigilance and conduct of the men employed thereon; and must report any misconduct or neglect of duty.

221 He must have a reliable watch and a copy of the time table; examine the General Order board before each trip; and compare time with the engineman before starting.

He must report for duty at the appointed time with his trainmen assist in making up his train when necessary; see that he has the proper waybills for the cars to be moved; see that the engine and train are provided with full sets of signals; see that the couplings and brakes are in good order before starting, and inspect them as frequently as opportunity permits; see that the trainmen occupy their proper places on the train; handle the freight with care, using every effort to prevent loss or damage; keep the car doors fastened except when loading or unloading; and not permit unauthorized persons to enter the cars, handle the freight or ride upon the train.

He must not move cars from stations without proper waybills and must see that the cars are in safe condition to be moved. When necessary to move the cars on station or loaded tracks, he must see that persons loading or unloading cars thereon are notified before the cars are moved. He must show his train orders to his brakemen.

Freight Brakemen.

706. The freight brakemen reports to the Trainmaster. He must obey the orders of the Yard Master. When on duty he must obey the direction of the conductor.

It is his duty to attend to the brakes; be provided with, take care of and properly display train signals; assist the conductor in loading or unloading the freight, in inspecting the cars, and in doing all things necessary for the safe and prompt movement of the train.

He must examine and know that the brake shafts and attachments, ladders, running boards, steps, handholds and other parts and mechanical appliances which he is to use, are in proper condition; if not, put them so, or report them to the proper parties and

222 have them put in order before using them.

He must report for duty at the appointed time, and, when necessary, assist in making up his train.

When not engaged in duty elsewhere, he must occupy the post assigned to him. The post of the rear brakeman (or flagman) is on

the last car. He must immediately go back to protect the train where the rules require, without waiting for signals or instructions to do so. The head brakeman must in like manner protect the front of the train; and if the train should part, the rear brakeman must immediately stop the rear portion and send forward the most reliable person he can secure to make stop signals until the front portion comes back, while he protects the rear. An assisting engine on the rear is a part of the train, and a flagman will be governed accordingly.

Brakemen must stop their trains at stations and control them in descending heavy grades without waiting for a signal from the engineman, and must be careful to avoid the sliding or heating of the wheels.

It was also agreed by and between counsel for both sides that the following rules, from the book of rules of the St. Louis, Iron Mountain & Southern Railway Company, effective November 1st, 1901, and now in force, shall be considered in evidence.

Signal Rules.

11. A fusee on or near the track burning red must not be passed until burned out. When burning green it is a caution signal.

12. Hand, Flag and Lamp Signals.

(*a*) Swung across the track.....Stop.
(*b*) Raised and lowered vertically.....Proceed.
(*c*) Swung vertically in a circle across the track, when the train is standing..... Back.
(*d*) Swung vertically in a circle at arm's length across the track when the train is running..Train has parted.

223

(*e*) Swung horizontally in a circle, when the train is standing.....Apply air brakes.
(*f*) Held at arm's length above the head when the train is standing.....Release air brakes.

Audible Signals.

14. Engine Steam Whistle Signals:

NOTE.—The signals prescribed are illustrated by "o" for short sounds; "—" for longer sounds. The sound of the whistle should be distinct, with intensity and duration proportionate to the distance signal is to be conveyed.

Sound.		Indication.
(*a*) o	Stop.	Apply brakes.
(*b*) — —		Release brakes.
(*c*) – ooo		Flagman go back and protect rear of train.
(*d*) — — — —		Flagman return from west or south.

(*e*) — — — — —	Flagman return from east or north.
(*f*) — — —	When running train parted; to be repeated until answered by the signal prescribed by rule 12 (*d*). Answer to 12 (*d*).
(*g*) oo	Answer to any signal not otherwise provided for.
(*h*) ooo	Three short sounds of the whistle when train is running is notice to postal clerks that train is approaching a mail catcher station. When this signal follows the station whistle, an interval of ten seconds must intervene. When train is standing, back. Answer to 12 (*e*) and 12 (*e*).
(*j*) oooo	Call for signals.
(*k*) – oo	To call the attention of trains of the same or inferior class to signals displayed for a following section.
(*l*) — oo	Approaching public crossing at grade.
(*m*) — — — — —	Approaching station, junctions and railroad crossings at grades.

15. The explosion of one torpedo is a signal to stop. The explosion of two not more than two hundred feet apart is a signal to reduce speed; and lookout for a stop signal.

224 *Movement of Trains.*

85. A train must not start until the proper signal is given.

86. At meeting points between trains of the same class the inferior trains must clear the main track before the leaving time of the superior trains, and must pull into sidings when practicable. If necessary to back in, the train must first be protected, as per rule 99, unless otherwise provided.

88 (*a*) At meeting and passing points, when conditions and circumstances are such that delay will be avoided by the superior train taking siding, it must be done. Conductors and enginemen are expected to exercise judgment and discretion in this respect.

(89) At meeting points between trains of different classes the inferior train must take the siding and clear the superior train at least five minutes, and must pull into the siding when practicable. If necessary to back in, the train must first be protected as per rule 99, unless otherwise provided.

An inferior train must keep at least ten minutes of the time of a superior train in the same direction.

98 (*a*) Second and succeeding class trains must carefully approach and pass, with trains under full control, water tanks and coaling stations. The responsibility for accident at such points will rest with the following train. This must not be considered as relieving any train from protecting itself while occupying main track against a train of superior right and class, as per rules 86 and 87.

98 (*b*) Second and succeeding class trains must be run with great care and under control when within the limits of yards, protected by yard limit boards.

Yard engines or road engines doing switching, when within yards protected by yard limit boards, will have the right to use main track upon the time of second and succeeding class trains, but must not use main track on time of first class trains without orders.

99 (*a*) When a train stops or is delayed, under circum-
225 stances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail when the conditions require it. The front of a train must be protected in the same way when necessary, by the front brakeman or fireman.

100. When the flagman goes back, to protect the rear of his train, the conductor or porter must, in the case of passenger train, and the next brakeman in the case of other trains, take his place on the train.

101. If a train should part while in motion, train men must, if possible, prevent damage to the detached portion. The signals prescribed by rules 12 (*d*) and 14 (*f*) must be given, and the front portion of the train kept in motion until the detached portion is stopped.

102. When cars are pushed by engine (except when shifting and making up trains in the yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

104. Switches must be left in proper position after having been used. Conductors are responsible for the position of the switches used by them and their trainmen, except where switch tenders are stationed.

105. Both conductors and enginemen are responsible for the safety of their trains, and, under conditions not provided for by the rules, must take every precaution for their protection.

107. A train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the passenger train. Trains and engines must run very slowly on any outer track when passing a standing passenger train.

108. No freight or work train must pass any station or siding at which it is not required to stop without engineman receiv-
226 ing go-ahead signal from rear end; failing to receive signal, Rule 101 should govern.

Rules for Movement by Train Orders.

210. * * * The copy (of train order) for each engineman must be delivered to him personally by the conductor, and the engineman must read it aloud to the conductor and understand it before acting upon it. Conductors must read their orders to their brakemen and enginemen must read their orders to their firemen.

Special Rules.

Conductors.

359. Conductors must know that the cars in their trains have been inspected. Any omission on the part of the inspectors must be regarded as a danger to the train, and at once be reported to the Superintendent, Division Superintendent or Train Master.

361. They must see that the doors of all loaded and empty cars in their trains are closed and securely fastened.

362. Conductors must examine their trains whenever they have an opportunity to do so, particularly when entering or leaving sidings or waiting for other trains.

363. All cars taken in their trains at intervening stations must be examined with extra care. They must use the utmost care to prevent the heating of journals. Any box showing a tendency to heat must receive immediate attention. They must require their trainmen to aid in examining their trains.

364. They are positively forbidden to go to meals or delay trains, for any cause, after receiving an order which allows them to proceed, without permission from the Superintendent, Division Superintendent, or train master. When such permission is received, conductors must report they are ready to go, and ask if there are any further orders for their train.

227 365. In case a train is held at a telegraph station, where there is no night operator, conductors must, if necessary, call the day operator into the office to get orders.

366. In the ordinary performance of their duties upon the road, conductors must collect and preserve all brasses, broken drawheads, brakerods, car doors, and other broken material which must be taken to terminal station and delivered to the car foreman or other person designated to receive it.

367. The proper place for a freight train conductor, while his train is in motion, under ordinary circumstances, is in the cupola of his caboose. If the caboose should not be provided with a cupola he will then maintain such other position, on the top or inside, as will give him a full view of his train and enable him to see that his men properly perform their duties, and to know that his brakemen go out promptly when necessary to flag. He must also keep a sharp lookout, especially when rounding curves. He must require all his brakemen to be on top of the train at least one mile before arriving at and while passing all stations and stopping places, descending and ascending grades, or at any point or time when extra precaution is necessary to insure safety.

368. Conductors must see that brakes are set on cars they leave on sidings, and when the siding is on a grade, they must, when practicable, couple all the cars together, and in addition to setting the brakes, the wheels must be blocked and safety switches properly adjusted. When not in use safety switches must be left open. In switching, train men must know that brakes are in good order before cutting off cars.

369. When doing work at stations a train man must always be left in charge of the rear of trains on main track, where the grade is such that cars would start back if brakes were released.

370. Conductors must not take cars that are, in their judgment, improperly or too heavily loaded, or that are not in a condition to run safely.

228 380. Conductors and engineers on the road when overtaken between stations by such storms or indications of high water which will cause damage, will proceed with great caution, keeping their trains under complete control, and at such speed that they can be stopped after coming in sight of any obstruction or damage to track in time to prevent accident. They will also stop and examine bridges and culverts or other places liable to be damaged by high water, and if they find any indications of danger from proceeding with their train, will, on arrival at the first telegraph station, call up the agent or operator and report to the office of their respective superintendent, division superintendent or train master for instructions, and will not proceed until such instructions are received.

381. All trains must be run under the supposition that an irregular train is liable at any moment to overtake them on any part of the road.

Brakemen.

400. While on the trains brakemen are under the direction of the conductor. It is their duty to attend to the brakes; be provided with, take care of and properly display train and danger signals, assist the conductor in loading and unloading freight, in inspecting the cars, and in all things necessary for the safe and prompt movement of the train; attend to the lighting, heating and ve-tilation of the cars; open and close the car doors and assist the conductor in the proper disposition of passengers and in preventing them from riding on the platform or in any way violating the regulations provided for their safety; in preserving order, and in all things requisite for the comfort of the passengers.

401. Trainmen must examine and know for themselves that the brake shafts and attachments, ladders, running boards, steps, handholds and other parts and mechanical appliances which they are to use are in proper condition; if not, report them to the proper

229 authorities that they may be put in order before using.

Enginemen.

413. Before leaving a terminal station the engineman must apply the air brakes and allow them to remain on long enough for the inspectors or train men to see that they are in perfect working condition throughout the train, and when cars have been attached or taken out, the brakes must again be applied to know that they are in working order before proceeding on the trip. In making regular stops brakes must be applied in such a manner as to avoid discomfort to the passengers or injury to the equipment. Enginemen must also know that the air signal is in proper working order.

414. Enginemen must test the air brakes at least one mile before reaching railroad crossings, draw bridges and before going down heavy grades and other hazardous places, and in case they do not hold must at once signal for brakes. Such test to be made by applying the brakes with sufficient force to ascertain whether they are working properly. When the conditions are such as to not require shutting off steam it should not be done.

421. While running after dark they must have in their cabs, where it cannot be seen by passing trains, a red lamp, lighted, in good burning order, with three torpedoes attached thereto, to be used to signal approaching trains in case of danger.

427. Engine men on freight trains must look back frequently while running to see that all is right.

429. They should observe whether watchmen and brakemen are at their posts, and report to the superintendent, division superintendent or train master any neglect of duty that may come to their notice. They must also report the absence of lights at switches where such lights should be shown.

431. They must not leave their engines while on duty except in case of necessity, and then the fireman or some competent
230 person must be left in charge.

435. Firemen must be familiar with the train rules that apply to the protection of their trains; must understand the use of all signals and be prepared to use them promptly when required.

It was also agreed by and between counsel herein that the following excerpts from time table No. 7 of the St. Louis, Iron Mountain & Southern Railway Company, taking effect at 12:01 A. M. Sunday, July 28, 1907, shall be considered in evidence.

Special Instructions for All Districts and Branches on Central Division.

Q. 12. Enginemen must never cut their engines off and leave their train without first consulting their conductor. This applies to trains of all classes. Conductors of second and inferior class trains and extras must, when practicable, be on their engines at all meeting points and approaching all yard limit stations, unless they are running closely ahead of a superior train, when they should be on the rear end.

(It was agreed, without the necessity of proof, that Rule Q12 is a rule and is contained in all time cards which are now in the hands of employés of the Missouri Pacific System in the operation of their trains.)

Instructions Governing the Use of Air Brakes.

11. Brakemen of freight trains will be expected to couple air hose in making up trains at terminal points, and have train in readiness to test air when engine reaches train. They will begin

invariably at the rear end of train and see that angle cock in train pipe at rear of last car is closed, and all other angle cocks in train pipe at the end of cars are open; that the hose are all coupled:
231 that the stop cock in branch pipe of each car is open, the handle of pressure retaining valve on each car is turned down, and all hand brakes released unless they are needed to hold the cars while making up trains.

(It was also agreed, without the necessity of proof, that Rule 11 applies to all other divisions, if such proves to be the fact, after conference with officials who know).

Special Instructions for the Van Buren District, Altus and Clarksville Branches.

D13. Second and inferior class trains and extras must run under control through yard limits at Van Buren, Denning, Coal Hill, Spadra, Russellville, and Argenta. In case of accident, responsibility rests with approaching train. Following sections of first class trains must run carefully through yard limits at Van Buren, yards, Denning yard, Coal Hill, Spadra, Russellville and Argenta.

(It was also agreed that this rule applies on all other divisions to yards only that are protected by yard limit boards.)

232 *Statement of J. M. Walsh.*

Statement of J. M. Walsh, Superintendent, in the Matter of State v. Chicago, Rock Island & Pacific Railway Co.

Concerning the matter of drawbars pulled out, will state that I am Superintendent of the Division which includes the Little Rock & Fort Smith Railway from Van Buren to Little Rock, covered by the testimony of Conductor Pearsall. We have a regular scrap train that goes over the road at regular intervals picking up all the materials from each station to which it is gathered. The section foremen pick up all the drawbars that are pulled out and take them to the stations, and from this we have a pretty good idea as to how many drawbars are pulled out each month. There are 16 freight trains per day over this division, making 480 a month. This includes all classes of freight trains, both local and through. Our records show that at least 90% of the drawbars pulled out are pulled out around the yards, either by local freight trains switching or by the switching crews. One hundred drawbars a month would cover all the draw bars pulled out, and of these, as said before, not over 10% are pulled out by through freight trains.

Endorsed on margin: "O. K." with parts obliterated out. Lewis Rhoton, Pros. Att'y."
(Parts obliterated not copied here.)

The foregoing was all the evidence in the case.

233 *Defendant's Requests for Findings of Law & Facts.*

The defendant thereupon requested the court to make the following findings of law and fact, numbered, one, two, three and four:

1. The verdict in this case will be for the defendant.

2. The employment and use of three brakemen on the train of defendant was unnecessary for the safety and protection of the employés on said train or the public, and there were no duties reasonably necessary which required the employment and use of the third brakeman on said train.

3. The employment and use of an engineer, fireman, conductor and two brakemen on freight trains of more than twenty-five cars is ample and sufficient for the safe and practical handling of said trains, and the employment of an additional, or third brakeman thereon is not reasonably necessary for the safety of said train, the employés thereon or the public.

4. The Act of the Legislature of Arkansas, No. 116, entitled, "An Act to prescribe the minimum number of employés to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act," approved March 28th, 1907, requiring the use of three brakemen on freight trains of more than twenty-five cars, is unconstitutional and void, because the same makes an unreasonable requirement and is beyond the scope of the police power of the State.

The court refused to make each of said findings of law and fact, numbered one, two, three and four, to which refusal of the court, to make each of said findings of law and fact, numbered one, two, three and four, the defendant saved its separate exceptions.

234 *Plaintiff's Requests for Findings of Law & Fact.*

The plaintiff requested the court to make the following finding of law and fact:

1. The verdict in this case will be for the plaintiff.

The court, over the objection of the defendant, made said finding of law and fact, to which action of the court in making said finding the defendant saved its exceptions.

A verdict was thereupon rendered in favor of plaintiff.

The defendant filed separate motions for a new trial, both of said motions being in the following form:

Comes the defendant and moves the court to grant it a new trial herein, and for cause says:

1. That the court erred in overruling its demurrer to plaintiff's complaint.

2. That the court erred in sustaining plaintiff's demurrer to paragraphs one, two, three, four and six, and each part thereof of defendant's answer.

3. That the court erred in holding that the burden was on defendant to sustain its defense under paragraph five of its answer.

4. That the verdict and judgment of the court is contrary to law.
5. That the verdict and judgment of the court is contrary to the evidence.
6. That the court erred in refusing to find the law and facts as requested by defendant, in its request numbered one.
7. That the court erred in refusing to find the law and facts as requested by defendant, in its request numbered two.
8. That the court erred in refusing to find the law and facts as requested by defendant, in its request numbered three.
9. That the court erred in refusing to find the law and facts as requested by defendant, in its request numbered four.
10. That the court erred in finding the law and facts as requested by plaintiff, in its request numbered one.
11. That the court erred in finding the law and facts as
235 requested by plaintiff, in its request numbered two.

Wherefore, defendant prays that the verdict herein be set aside.

BUZBEE & HICKS,
Attorneys for Defendant.

236 The court overruled said motions for a new trial, to which action of the court in overruling said motions, the defendant saved its exceptions.

The defendant asked and was given ninety days within which to prepare and file its bill of exceptions.

And now comes the defendant, with this, its bill of exceptions, containing all of the evidence introduced, exceptions saved and findings of law asked, given and refused at the trial and asks that the same be approved, signed and ordered filed and be made a part of the record in this case, which is hereby done.

Witness my hand, as Judge of the Pulaski Circuit Court, Second Division, this the 1 day of Feb'y, 1908.

E. W. WINFIELD, *Judge.*

Endorsed: Filed this 1st day of Feb'y, 1908. P. H. Carnes. Clerk. By R. B. Brodie, D. C.

237 *Clerk's Certificate.*

Clerk's Certificate of Transcript.

STATE OF ARKANSAS,
County of Pulaski:

I, P. H. Carnes, Clerk of the circuit court within and for the County aforesaid, do hereby certify that the annexed and foregoing is a true, correct and compared transcript of the pleadings and orders in the causes therein set forth, as the same appear on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court this 4th day of February, 1908.

[SEAL.]

P. H. CARNES, *Clerk,*
By L. J. GIBSON, *D. C.*

238 *Fee Bill.*

Fee Bill.

P. H. Carnes, Clerk	$19.25
" " This Transcript	75.00
C. C. Kavanaugh, Sh'ff	12.55
Witnesses	98.70
Total	$205.50

Attest:
[SEAL.]

P. H. CARNES, *Clerk*,
By L. J. GIBSON, *D. C.*

239 *Filing in Supreme Court.*

No. 230.

Pulaski, 2nd Div. E. W. Winfield, J.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Appellant,
vs.
THE STATE OF ARKANSAS, Appellee,

Transcript.
Filed February 13, 1908.

P. D. ENGLISH, *Clerk*,
By W. P. SADLER, *D. C.*

240 *Supreme Court Order.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 13th day of April, 1908, a day of said term:

230.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Appellant,
v.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

On motion and by consent of attorneys this cause is passed from April 20th, 1908, the regular day for submission, to the 11th day of May, for oral argument.

241 *Oral Argument in Supreme Court.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of November, A. D. 1907, at the Courthouse, in the City of Little Rock, the following proceedings were had, to wit: On the 11th day of May, 1908, a day of said term:

230.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO., Appellant,
v.
STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

This cause being regularly called, come the parties thereto by their respective attorneys, and said cause is submitted upon the transcript of the record, the briefs filed and on oral argument by the respective attorneys, and by the court taken under advisement.

242 *Judgment in Supreme Court.*

STATE OF ARKANSAS,
In the Supreme Court:

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 25th day, being the fourth Monday of May, A. D. 1908, at the Courthouse in the City of Little Rock, the following proceedings were had, to-wit: On the 1st day of June, 1908, a day of said term:

230.

CHICAGO, ROCK ISLAND & PACIFIC RY. CO., Appellant,
v.
THE STATE OF ARKANSAS, Appellee.

Appeal from Pulaski Circuit Court.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, Second Division, and was argued by counsel, on consideration whereof, it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all her costs in this court in this cause expended and have execution thereof.

243 *Opinion.*

In the Supreme Court of Arkansas, June 1, 1908.

C., R. I. & PAC. RY. CO.

v.

STATE.

Statement by the Court.

This appeal involves two cases, but only one will be stated, as there is no material difference between them. The Prosecuting Attorney of the Sixth Judicial circuit filed complaint against the defendant Chicago Rock Island & Pacific Ry. Co., a foreign corporation alleging a violation of Act No. 116 of 1907, which is as follows:

"SEC. I. No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three brakemen, regardless of any modern equipment of automatic coupler and air brakes, except as hereinafter provided.

"SEC. II. This act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty five cars, it being the purpose of this act to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train consisting of twenty five cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor and three brakemen, but nothing in this act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this act.

"SEC. III. Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved.

244 "SEC. IV. All laws and parts of laws in conflict herewith are repealed, and this act shall take effect and be in force thirty days after its passage."

The answer was in six paragraphs, and was as follows:

I.

"For answer defendant says:

"It admits that it is a corporation engaged in the railroad business and in the transportation of freight over railroad lines in the State of Arkansas.

It admits that on the 5th day of May, 1907, it operated and ran a freight train, containing more than twenty five cars in Pulaski County, without having equipped the same with as many as three brakemen. It admits that said train was a freight train, No. 42, Engine No. 1836, and that said train was operated in an easternly direction from Argenta, Arkansas to Hopefield, Arkansas, and over a railroad of more than fifty miles in length, but defendant states that said train was engaged in carrying interstate commerce, and was, in fact, being operated from the city of Argenta, in the State of Arkansas, to the city of Memphis, in the State of Tennessee; that Hopefield is an intermediate station between Argenta and Memphis, and it was therefore necessary for said train to pass through Hopefield on its journey from Argenta to Memphis, as aforesaid.

It denies that the operation of said train, in the manner aforesaid, without having equipped said train with as many as three brakemen, was in violation of law; and denies that by so operating said train it became indebted to the State of Arkansas in the sum of $500.00 or in any other sum.

II.

And for further defense, defendant says:

That the Act of Arkansas, No. 1116, entitled, "An act to prescribe the minimum number of employees to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act", approved March 28th, 1907, under
245 which it is sought to recover from the defendant in this suit, is unconstitutional and void, for the following reasons:

(a) Said Act, in requiring that each freight train consisting of more than twenty five cars in length, and exempting freight trains of less than twenty five cars in length, grants privileges and immunities to companies and officers of court operating freight trains of less than twenty-five cars in length which are not granted to companies and officers of court operating freight trains of more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains of more than twenty-five cars in length which are not granted to conductors and brakemen employed on freight trains of less than twenty five cars in length, and is, therefore, contrary to and in conflict with Section Eighteen Article Two, of the Constitution of Arkansas.

(c) Said Act, in applying to freight trains of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains of more than twenty-five cars in length and to conductors and brakemen employed by companies and officers of court operating freight trains

of less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

III.

(*a*) Defendant states that there are in the State of Arkansas many companies and officers of court owning and operating lines of railroad more than fifty miles in length and operating thereon, freight trains of more than twenty-five cars and that there are many companies and officers of court owning and operating lines of railroad less than fifty miles in length and operating thereon freight trains of more than twenty-five cars.

That while this defendant owns and operates more than fifty miles of railroad, it also owns and operates, in the State of Arkansas,
246 many branches less than fifty miles in length, over which it operates freight trains of more than twenty-five cars; that the operation of said freight trains over said branches is in all respects similar to the operation of freight trains over lines of railroads of companies and officers of court owning and operating railroads less than fifty miles in length.

(*b*) Said Act, in applying to companies or officers of court owning or operating lines of railroad more than fifty miles in length, and exempting companies or officers of court owning or operating lines of railroad less than fifty miles in length, grants privileges and immunities to companies and officers of court owning and operating lines of railroad less than fifty miles in length which are not granted to this defendant and to other companies and officers of court owning and operating line- of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed by companie*d* and officers of court owning and operating lines of railroad more than fifty miles in length, which are not granted to conductors and brakemen employed by this defendant and other companies and officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section Eighteen, Article Two, of the Constitution of Arkansas.

(*c*) Said Act, in applying to companies or officers of court, owning or operating lines of railroad of more than fifty miles in length, and exempting companies or officers of court operating lines of railroad of less than fifty miles in length is a denial of the equal protection of the laws to this defendant and other companies and officers of court operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

(*d*) Said Act, in applying to this defendant and to other companies and officers of court, operating lines of railroad more
247 than fift*h* miles in length, and exempting companies and officers of court owning and operating lines of railroad less than fifty miles in length, is a denial of the equal protection of the laws to conductors and brakemen employed by companies or officers of court owning and operating lines of railroad less than fifty miles

in length, and is, therefore, contrary to and in conflict with section one of the Fourteenth Amendment to the Constitution of the United States.

IV.

Defendant alleges that it operates within the State of Arkansas, six hundred and fourteen miles of railroad; that since said line of railroad consists of main track and several branches of less than fifty miles in length; that it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are of more than twenty-five cars in length; that some of said trains are operated upon its main line and some of said trains are operated upon its branches of less than fifty miles in length; that the fines imposed by said Act of Arkansas, No. 116, approved March 28th, 1907, are such that if defendant failed to comply with said Act, on each of its freight trains over twenty five cars in length, operated in the State of Arkansas, the fines to which it would be subject, would amount to a large sum, to wit: about $12,500 per day, and, if continued during the time necessary to test the validity of said Act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said Act are, therefore, so excessive and burdensome as to deprive the defendant of its right to have the validity of said act tested by the courts, and have the effect of depriving the defendant of its property without due process of law and of denying to it the equal protection of the laws; that said Act is, therefore, contrary to and in conflict with Article Two, Section Nine, of the Constitution of Arkansas, and of Section One of the Fourteenth Amendment to the Constitution of the United States.

248 V.

Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars and could be stopped by the application of the air brakes by the engineer of said train, without the intervention or assistance of the conductor or brakemen, as required by act of Congress, and the order of the Interstate Commerce Commission, made thereunder; that it had employed on said train a conductor and two brakemen and that the employment of another brakemen on said train was unnecessary, because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said Act, in attempting to require the defendant to employ three brakemen on said train attempted to require the defendant to expend a large amount of money for a useless and unnecessary purpose and to deprive the defendant of its property without due process of law, and is, therefore, in violation of and in conflict with Section One, of the Fourteenth Amendment to the Constitution of the United States.

VI.

(*a*) Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used solely for the transportation of freight from points in the State of Arkansas, and points in other Territories and States west of the State of Arkansas, to Memphis, in the State of Tennessee, and other points beyond the State of Arkansas, and, therefore, was engaged in moving interstate traffic, into and through the State of Arkansas, and that said Act, in requiring the defendant to equip said train with three brakemen, is an attempt to regulate commerce among the several States, and is, therefore, contrary to Section Eight, Article One, of the Constitution of the United States, and is contrary to and in conflict with the Act of Congress, approved March 2nd, 1893,
249 and amended April 1st, 1896, entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers, engaged in interstate commerce, to equip their cars with automatic coupler and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes," and the act of Congress approved June 11th, 1906, entiled "An act relating to liability of common carriers engaged in commerce between the States and between the States and foreign nations to their employees", and the Act of Congress, approved June 29, 1906, entitled "An act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and other acts of Congress, which were passed pursuant to the power vested in Congress by said Section Eight, Article One, of the Constitution of the United States.

(*b*) Defendant states that said Act is void, because the subject matter thereof has been legislated upon by the Congress of the United States, by the acts hereinbefore referred to."

The State demurred to Paragraphs I, II, III, IV and VI of said answer, and the demurrers were sustained.

The case was then tried on the defense set out in the 5th paragraph of the answer. The defendant adduced testimony tending to prove the truth of the allegations therein made and to show that the legislative requirement to employ three brakemen on its freight trains required a large expenditure of money for a useless and unnecessary purpose.

On the other hand, the State introduced testimony tending to prove that the employment of three brakemen was necessary for the safety of the train men and of the public in the movement of freight trains as operated on defendant's railroad. This testimony was given by experienced train men. They explained that there is an increased amount of work to be done since the adoption of the air brakes and automatic couplers, notwithstanding the brakemen are relieved of the duty of stopping trains (except in emergencies) by hand brakes. This is due to the increased tonnage of the trains, the in-
250 creased capacity of cars, the increased number of cars in trains, the increased power of heavy engines, and the ad-

ditional reports required to be made by conductors and inspections to be made by conductors and brakemen. In addition to these reasons, it is a daily occurrence for draw heads to pull out, owing to the heavy draught of the engines and the lack of corresponding strength of draw heads to meet them; and this usual happening requires the service of two, and frequently three men, to properly chain up the cars, especially in the night time. Much of the conductor's time is taken up with making his reports, and he cannot, under the present system, give as much time to the physical handling of the train as under the old system.

When there is a break in the train, or for any other cause it is stopped between stations, it is at once the duty of the conductor to send a brakeman back to flag approaching trains from the rear, and frequently it is his duty to send another brakeman forward to flag trains approaching from that direction. The necessity for signaling for these purposes frequently reduces the force to the conductor engineer and fireman, unless three brakemen are provided. Safe operation and the rules of the company require that the engineer and fireman remain at their post in the engine.

Trains are frequently stopped at public crossings, and are frequently switched across public crossings; and oftentimes it occurs that the safety of the public requires the posting of signal men at these crossings. In switching, the services of brakemen are required to work the automatic couplers and connect and disconnect the air hose, and in the opinion of these witnesses the safety of the train crew is promoted by having three brakemen to do the switching, in addition to which the train movements are made with more certainty and dispatch and with less danger of accidents, and the freight is handled more speedily.

Other reasons are given why the emergencies and hazards of the business require the employment of three brakemen to pro-
251 mote the safety of the train men handling the train, of train men and passengers on other trains, and the public in crossing the tracks. It was shown that the St. Louis Iron Mountain & Southern Ry. Co. which operates the largest mileage of any railroad in the State uses three brakemen, except on one branch, and the other railroads operating in the State use two brakemen.

The court found for the State against the railroad company in both cases, and the railroad company has appealed.

252 *Opinion.*

HILL, C. J. (After stating the facts):

The railroad company contends that the act is unconstitutional for three reasons, which will be disposed of in the order presented by counsel for appellant.

1. That the act is unconstitutional because repugnant to Sec. 18, Article II, of the Constitution of Arkansas, and Sec. 1 of the 14th Amendment to the Constitution of the United States.

Sec. 18, Article II of the Constitution of Arkansas reads as follows:

"The general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Sec. 2 of Article IV of the Constitution of the United States provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It has long been settled that a corporation is not a citizen within the meaning of this clause of the Constitution. Paul v. Virginia, 8 Wall. 168; Mining Co. v. Pennsylvania, 125 U. S. 181; Orient Ins. Co. v. Daggs, 172 U. S. 557; Blake v. McClung, 172 U. S. 239.

It is also provided, in Sec. 1 of the 14th Amendment that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and it has also been held that this clause does not reach to corporations. Norfolk, &c. Ry. Co. v. Penn., 136 U. S. 114; Western Turf Assn. v. Greenberg, 204 U. S. 359; Waters Pierce Oil Co. v. Hot Springs, 109 S. W. Rep. 293.

The reasoning which takes corporations out of the "privileges and immunities" accorded citizens of one State in the several States equally excludes corporations from the protection of Sec. 18 of Art. II of the State Constitution.

But corporations are persons within the meaning of the 14th Amendment which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the
253 laws. Blake v. McClung, 172 U. S. 239; Santa Clara Co. v. So. Pac. Ry. Co. 118 U. S. 394; G. C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; Smyth v. Ames, 169 U. S. 466.

The argument against the act under the equal protection clause is two-fold: (*a*) That the classification of railroads over and under fifty miles in length is arbitrary and without just relation to the object to be accomplished; and (*b*) that the 3rd paragraph of the answer, to which a demurrer was sustained, alleged that many companies owned and operated lines of railroad in this state less than 50 miles in length and that the defendant owned and operated many branch lines of less than fifty miles in length, over which it operates freight trains of more than 25 cars, and the operation of its freight trains over said branches is in all respect similar to the operation of freight trains over many short lines of railroad which are operated by companies owning less than 50 miles of railroad; and consequently the act is offensive to the constitutional provision requiring the equal protection of the law to all persons under like and similar circumstances.

(a) In discussing the duty of a court to whom is addressed an appeal to strike down legislation as so arbitrary that it amounts to a denial of the equal protection of the law, Mr. Justice Holmes well said: "There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. * * * When a State legislature has

declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. * * * Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remem-
254 bered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Ry. Co. v. May, 194, U. S. 267.

Applying this principle here, can the court clearly see that there is no fair reason for this law which would not require with equal force its extension to all railroads, irrespective of their length, where the freight trains consist of more than twenty-five cars? It will be noticed that the act does not apply to any line of railroad, however long, unless the freight trains shall consist of more than twenty-five cars. It thereby permits both long and short lines to run short freight trains without being amenable to this act; and this question is whether the classifications of the railroads into long and short lines, divided at the point of fifty miles, is a just and reasonable one.

That there is a marked difference in the management, control and operation of long and short line railroads is a matter of common knowledge, known to all observers. Great trunk lines have been constructed through the country that are highways of interstate and international commerce. Both freight and passenger trains pass back and forth upon them every few minutes, and great speed is attained in their movement. On the other hand are found many short lines which supply the needs of small communities, and upon such lines there are but few trains, and those of light weight and of few coaches and cars in comparison with the magnificent passenger and tremendous freight trains moved *moved* upon the large trunk lines. Bringing the comparison more nearly home, there are found in this State important through lines, upon which are moved many passenger and freight trains daily; and there are also found many short lines of railroad, some owned and operated by independent companies and some operated as branches and feeders to the larger companies by whom they are owned or controlled. Upon these small roads the necessity of protecting trains from collision from either end is materially less than upon the great lines where the trains are
255 more numerous, heavier and accustomed to greater speed. The movement of a train is necessarily less fraught with danger where there is no other train upon the line, or but few, than upon a line where trains are moving every few minutes, or every few hours. Short lines are usually lightly constructed and carry light rolling stock in comparison to the great systems. These, and other matters of common observation of the difference between long and short lines of railroad can afford reasons why the legislature should leave untouched the short lines of railroad with legislation designed to promote safety in operation of long freight trains.

To approach the question in another way: In G. C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, Mr. Justice Brewer for the Court said: "It is apparent that the mere fact of classification is not sufficient

to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Is there some difference between lines over and under 50 miles in length which bears a just and proper relation to the requirements placed upon them by this act? In one sense there can be no substantial difference between a railroad 49 miles long and one 51 miles long; but if there is a just distinction between long and short lines of railroad that will bear classification at all, then it is unobjectionable and necessary to draw the line somewhere, although it may, at the given point, be arbitrary.

The Supreme Court of the United States in N. Y., N. H. & H. Ry. Co. v. New York, 165 U. S. 628, dealt with this point. There was a statute of New York applying to railroads over fifty miles in length, forbidding them to heat their cars with stoves or furnaces kept inside of the cars or suspended therefrom; and the Court through Mr. Justice Harlan said: "But it is contended that the statute is
256 repugnant to the clause of the Fourteenth Amendment forbidding a State from denying to any person within its jurisdiction the equal protection of the laws. This contention is based upon that clause of the statute declaring that it shall not apply to railroads less than fifty miles in length. No doubt the main object of the statute was to provide for the safety of passengers traveling on what are commonly called trunk or through lines, connecting distant or populous parts of the country, and on which the perils incident to traveling are greater than on short, local lines. But as suggested in argument, a road only fifty miles in length would seldom have a sleeping car attached to its trains; and passengers traveling on roads of that kind do not have the apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger coaches, on account of the burning of cars in case of their derailment or in case of collission. In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the State of the class to which it is made applicable." There can be no distinction in principle between that legislation and this and the classification there, identical with this, was sustained on the difference between the danger of operation on trunk lines and local lines.

Cotting v. K. C. Stock Yds. Co. 183 U. S. 79, is pressed upon the Court as authority declaring void the classification here made. While the principles involved in the Cotting case were the same as those involved here and in the New York case supra, the facts required a different application of them. In the first place, the subject of regulation here and in the New York case was common carriers on public highways, which are burdened with obligations which do not rest upon individuals and corporations not thus employed, as pointed

out in the Cotting case; and in the second place, the act there
257 was so framed as to apply to one company although there were other companies engaged in like business and similarly situated in the State of Kansas. The classification was made to depend solely upon the amount of business, and fell upon one company alone while other companies similarly situated, different only in the amount of business transacted, escaped. There was no question therein of public safety, or the safety of men engaged in public service.

Other cases cited can easily be differentiated from this case and the New York case, but the differences are not important for the principles invoked in all of them are the same; the difficulty is in the application of them to the given statute and this was well explained in Atchison, Topeka &c. Ry. Co. v. Matthews, 174 U. S. 96; "While cases on either side and far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely arbitrary or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. * * * In some of them the court was unanimous. In others it was divided; but the division in all of them was, not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line."

It is not for the court to say whether the classification is wise or unwise, but merely whether it has a reasonable relation to the object sought to be accomplished, provided that the object is one with which the legislature had power to deal. If the classification is not arbitrary, but within reasonable limits as heretofore defined, then the courts must sustain it. The court regards this act as falling
258 within that class.

(*b*). The 3rd paragraph of the answer, to which a demurrer was sustained, alleged that the defendant owned and operated many branche lines less than fifty miles in length, over which it operates freight trains of more than 25 cars, and that the operation of said freight trains over said branches is in all respects similar to the operation of freight trains over other lines of railroad of less than fifty miles in length which are owned and operated by companies owning less than 50 miles of railroad; and that the act is for this reason offensive to the provision requiring the equal protection of the law to all persons under like and similar circumstances.

The determination of this defense depends upon the construction of the act. If the act places the branch lines of appellant railroad company which are less than fifty miles in length, and which are operated similarly in all material respects to independent lines, within its terms, and leaves without its terms the short lines of railroad which are operated similarly to said branch lines but owned by independent companies, (and the demurrer to the 3rd paragraph of the

answer admits this to be true,) then said act would fall on the other side of the line and be governed by Yick Wo v. Hopkins, 118 U. S. 356, and Cotting v. K. C. Stock Yds. Co. 183 U. S. 79. If it does not place such branches within its terms, then there is no discrimination between them and other short lines independently operated, and the matters set forth in the 3rd paragraph go for naught.

In construing the act, the court must bear in mind that "where one construction will make a statute void for conflict with the constitution, and another would render it valid, the latter will be adopted, though the former at first view is otherwise the more natural interpretation of the language." 2 Lewis' Sutherland on Statutory Construction, sec. 498. The Supreme Court of the United States stated the same principle as follows: "But if there were room for two constructions, both equally obvious and reasonable, the
259 court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution." Grenada Co. Sup. v. Brogden, 112 U. S. 261. These authorities were recently approved by this court which thus stated the principle: "It is the duty of the court to give the statute such construction, if reasonably consistent with the language employed, as will render it constitutional and valid." Western Union Tel. Co. v. State, 82 Ark. 309.

The first section of the act prohibits any railroad company (or officer of court), owning or operating any line or lines of railroad and engaged in the transportation of freight over its said line or lines from equipping its freight trains with less than a full crew as therein prescribed. This lays its mandate upon the company which is engaged in the transportation of freight and which owns or operates a line or lines of railroad regardless of other safety equipment of its trains.

The second section eliminates all railroad companies whose line or lines are less than fifty miles in length, and eliminates all freight trains on any line, regardless of length, where the train consists of less than 25 cars. And then, to be sure that the intent is plain, the act declares its own purpose to be "to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train consisting of 25 cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor and three brakemen." This legislation is pointed at two things: Long lines of railroad, and long freight trains. The length of the road is immaterial if the train is short—one which the legislature thought could be safely handled by the ordinary crew with two brakemen. If the freight train was long, then a further consideration moved the legislature: such freight trains
260 might be safely handled on a small line, where the traffic was light, the hazard of the service small and the danger from collision with other trains remote; but they could not be safely handled with such crew upon long lines, not on account of the length

of the line per se but on account of the well known heavier traffic and greater train movement upon long lines in consequence of which the danger is thought to be greater. If, as admitted by the demurrer to the third paragraph there are many independent short lines in the State similar in operation to the branch lines of the appellant company then the only distinction between them and the branch lines of a company of longer mileage would be in the ownership.

Does the elimination in the second section mean railroads less than fifty miles, or does it mean the elimination of companies whose roads are less than fifty miles in length? It must be confessed that the act is not clear on this subject, and it is fairly open to either construction, and each has been plausibly presented. In obedience to the rules of statutory construction heretofore stated, where an act is fairly susceptible of either of two constructions, one of which would render the act invalid, it is then the duty of the court, out of deference to the legislature to adopt that construction which will render it valid. To adopt the construction that the act eliminates from its operation railroad lines which are less than fifty miles in length because they are owned by a company not owning more than fifty miles of road, and does not eliminate lines which are less than fifty miles in length and operated separately but in all respects similar to the other lines, because they may be owned by some company owning longer lines in the State, would be plainly unconstitutional under the authorities heretofore reviewed.

It may be argued that the legislature intended to treat these short lines and branches of the larger lines as part of the larger systems. If the railroad companies operate them as part of their systems, certainly they are within the act, and the similarity with the short independent lines does not then exist. If the railroad companies operate them separately as independent lines are operated,
261 then there can be no just reason in principle for a distinction between them and the separate lines. Such distinction would then be based solely upon ownership. This legislation can only be supported on account of its supposed promotion of the safety of the public and the employees of a public service corporation, and a distinction based on ownership is wholly untenable.

The proper construction to place on the act, and that renders it valid, is: If the short line is in fact used as a continuous line with the main line, or in any other way as a part of it, and not as a separate line merely connecting with it, then it is a part of the line. But if it is a mere connecting line, separately operated—operated as an independent short line is operated—although owned by the company owning the larger line, then it would not be within the statute.

II. It is said that the act is unconstitutional because it is an attempt by the State to regulate inter-state commerce, contrary to the power vested in Congress in Sec. 8, Art. 1, of the Constitution of the United States. In paragraph six of the answer, are set forth various statutes which have been passed by Congress in regulation of inter-state traffic. Briefly stated, they are the "Safety Appliance Act" the "Employers Liability Act" (Recently declared unconstitutional in

"The Employers Liability Cases" 207 U. S. 463) and acts amendatory of the Interstate Commerce Act. The contention is made that these acts have excluded State regulation upon the subject matter of the act in question.

In the regulation of interstate commerce there are three powers: The exclusive State power, exclusive National power, and the concurrent power.

First, those in which the power of the State is exclusive; these "concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce directly, their bearing upon it is so remote that it cannot be termed, in any just sense, an interference." This embraces construction of highways, turnpikes, railroads and canals, between points in the
262 same State, and the regulation of toll for the use of the same; and the bridging and the regulation of non-navigable streams and control of navigation of strictly internal waters and other strictly internal transportation. Second, where Congress has not acted, in its silence the States may act on subjects local in their nature, but which incidentally affect or facilitate commerce; and this is the concurrent power. It involves regulation of pilots; quarantine and inspection laws and the policing of harbors; the improvement and bridging of non-navigable streams (subject to an overseeing by Congressional legislation that the improvement does not interfere with interstate and foreign commerce); the establishment of ferries; in a word, that "immense mass of legislation" usually referred to as the police power of the State, which may affect incidentally or facilitate foreign or interstate commerce, and regulate, for the protection of the health, morals or general welfare of the State, the instrumentalities of commerce, so long as Congress itself does not cover the subject with regulations which conflict with the State regulations. Third, where the laws are from their nature national in character, instead of being of a local nature, and affecting interstate commerce but incidentally, the silence of Congress indicates that it wills that such commerce shall be free and untrammeled by State legislation, to this extent—quick or dead—the power of Congress is exclusive. Covington Bridge Co. v. Kentucky, 154 U. S. 204; G. C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98; Judson on Interstate Commerce, sec. 22-23.

The question here is, first to what class this act belongs, and second, does it conflict with any of the acts of Congress or the silence of Congress on a subject in the class in which the silence of Congress is as potent as its action.

Smith v. Alabama, 124 U. S. 465, answers as to the character of these laws. It is therein said: "It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of the common carrier of persons and merchandise, whether by land or water, and the means authorized by which in-
263 juries resulting from the failure properly to perform their obligations may be either prevented or redressed."

"The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by

which it adopts, for cases within the scope of its power, the rule of the State law, which until displaced, covers the subject."

This explanation of the character of legislation permitted the State in regulating the instrumentalities of interstate commerce show- that the act in question belongs to the concurrent class—that is, that field of legislation in which it is competent for both the State and the Nation to enter; but the legislation of the State must give way to that of the Nation when they conflict, as stated in Smith v. Alabama: "It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

It is insisted that because, in the Acts set forth in the answer, Congress has legislated on safety appliances and other means to promote the safety of freight trains engaged in interstate commerce, that the action of the State upon this subject is excluded because the non-action of Congress upon this precise question is equivalent to positive action by Congress that there shall be no legislation over the subject except what it enacts when it once touches the subject. But this argument has been rejected by the Supreme Court of the United States, in M. K. & T. Ry. Co. v. Haber, 169 U. S. 613; the Court said:

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the
264 repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

And again, in the same case, the court said: "These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States, or by some valid act of Congress, must be respected until Congress intervenes."

In G. C. & S. F. Ry Co. v. Hefley, 158 U. S. 98, the same thought was thus expressed: "Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation."

There is no direct interference between the legislation of Congress

relied upon and the act in question. Each may stand, each cover its own field; and there is no apparent ground of conflict possible in the operation of the two acts for they do not reach the "precise subject matter."

III. It is contended that the act as applied to interstate commerce is arbitrary and unreasonable, and is contrary to the due process clause of sec. 1 of the 14th Amendment. These contentions are embraced in the 2nd, 4th and 5th paragraphs of the answer. As far as the 4th paragraph is concerned, that has been disposed of by the construction placed upon the act. So much of the second paragraph as is herein relied upon is presented in another form
265 in the 5th paragraph, the substance of which is that the requirements of the act constitute an unnecessary and burdensome expense, and are an arbitrary and unreasonable interference with the interstate commerce and the right of the company to regulate its own affairs.

Much testimony was taken under the 5th paragraph, the substance of which is in the statement. It is not for the court to determine which side of that controversy has the best of the argument, that was for the legislature. If it is a fair subject of controversy whether the act is promotive of the safety of employees of a common carrier on a public highway, and of the passengers and travelers on said highway, to have such legislation, then the action of the legislative department in the premises is conclusive, and this evidence clearly shows that it is a matter within the legislative discretion. It is only where the burden on the carrier is arbitrary and without any corresponding benefit to the public that the courts can interfere. This subject was recently discussed at some length by this court in La. & Ark. Ry. Co. v. State, — A. L. R. —; 106 S. W. Rep. 960.

Appellant cites Houston & Tex. Cent. Ry Co. v. Mayes, 201 U. S. 321, to sustain its contention that the act is an unreasonable interference with interstate traffic. There is much difference between the act condemned there and the one here. That act was not dealing with the safety of train employees or the public, but was upon the subject of furnishing cars. The turning point of the decision was that the act made no exception in case of sudden congestion of traffic and actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places beyond its line, and made no allowance for interference of traffic by wrecks or other accidents. The act in question has no such unbending provisions. It does not apply to any train which consists of less than 25 cars nor to short independent or branch lines, and only requires upon the long lines and the long trains one more brakeman than the appellant company now has employed, which number another road, of larger mileage than appellant road
266 in this State, now employs; and further provides that the penalties of the act shall not be incurred during strikes of men in train service of the lines involved.

The court fails to find any constitutional objection to the act.

Judgment affirmed.

267 *Certificate to Transcript.*

STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, Clerk of the Supreme Court of the State of Arkansas, do hereby certify that the above and foregoing pages of typewriting, contains a full true and perfect copy of the transcript of the record of the circuit court of Pulaski County, Second Division, of the State of Arkansas, in the case of State of Arkansas, Plaintiff and Chicago Rock Island & Pacific Railway Company, Defendant, as the same appears of record and now on file in my office at the State House in the City of Little Rock, State of Arkansas.

And I further certify that *it* also contains a true perfect and complete copy of all the orders, judgment and opinion of the Supreme Court in the said case on appeal to the Supreme Court.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in the City of Little Rock, this the 20th, day of July, A. D. 1908.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

268 *Assignment of Errors.*

In the Supreme Court of Arkansas.

No. 10.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Assignment of Errors.

Now comes the appellant, The Chicago, Rock Island and Pacific Railway Company, and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

First. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116, of the Legislature of Arkansas, of 1907, was valid. The validity of said Act was denied and drawn in question by the appellant, The Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section One, of the Fourteenth Amendment to the Constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Second. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116, of the Legislature of Arkansas, of 1907, was valid. The validity of said Act was denied and drawn in question by the appellant, The Chicago, Rock Island and Pacific
269 Railway Company, on the ground of its being repugnant to that part of Section One, of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Third. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116, of the Legislature of Arkansas, of 1907, was valid. The validity of said Act was denied and drawn in question by the appellant, The Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section Eight, Article One, of the Constitution of the United States, vesting in Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

Fourth. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116, of the Legislature of Arkansas, of 1907, was valid as applied to each of the trains sued upon in these actions. The validity of said Act, as applied to each of said trains, as sued upon in this action, was denied and drawn in question by the appellant, The Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section Eight, Article One of the Constitution of the United States, vesting in Congress, the power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Fifth. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116, of the Legislature of Arkansas, of 1907, was valid. The validity of said Act was denied and drawn in question by the appellant, The Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section One of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty or property without due process of law."

270 Sixth. The Supreme Court of Arkansas erred in affirming the action of the trial court in rendering a verdict against the appellant, The Chicago, Rock Island and Pacific Railway Company.

Seventh. The Supreme Court of Arkansas erred in not reversing the judgment of the trial court.

For which errors, the appellant, The Chicago, Rock Island and Pacific Railway Company, prays that the said judgment of the Supreme Court of the State of Arkansas, dated June 1st, 1908, be reversed, and a judgment rendered in favor of the appellant Company, and for costs.

THOMAS S. BUZBEE,
JOHN T. HICKS,
Attorneys for The Chicago, Rock Island and Pacific Railway Company.

Filed July 14, 1908.
PEYTON D. ENGLISH, *Clerk.*

271 *Petition for Writ of Error.*

In the Supreme Court of Arkansas.

No. 10.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the appellant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

THOS. S. BUZBEE,
JNO. T. HICKS,
Attorneys for Appellant.

STATE OF ARKANSAS,
Supreme Court, ss:

Let the writ or error issue upon the execution of a bond by The Chicago, Rock Island and Pacific Railway Company to the State of Arkansas, in the sum of One Thousand Dollars; such bond when approved to act as a supersedeas.

Dated July 14th, 1908.

JOS. M. HILL,
Chief Justice, Supreme Court of Ark.

Filed July 14th, 1908.
PEYTON D. ENGLISH, *Clerk.*

272 *Bond.*

In the Supreme Court of Arkansas.

No. 10.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Whereas, the appellant, The Chicago, Rock Island and Pacific Railway Company, has taken an appeal from the judgment of the Supreme Court of Arkansas, rendered at its May term, 1908, against the appellant, The Chicago, Rock Island and Pacific Railway Com-

pany, in favor of the appellee, State of Arkansas, for the sum of Two Hundred Dollars, with costs, and the appellant desires to supersede said judgment now W. M. Kavanaugh, and W. L. Hemingway, sureties, hereby covenant with the said appellee that the said appellant will pay to the appellee all costs and damages that may be adjusted against the appellant on the appeal, or in the event of the failure of the appellant to prosecure said appeal to a final judgment in the Supreme Court of the United States, or if said appeal shall for any cause be dismissed, that said sureties shall pay to the appellee all costs and damages, and shall perform the judgment of the court appealed from; also that said appeal shall be prosecuted without delay; also, that they will satisfy and perform the judgment or order appealed from in case it should be affirmed and any judgment or order which the Supreme Court of the United States may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order and all rents or damages to property during the pendency of
273 the appeal of which the appellee is kept out of possession by reason of the appeal.

Witness our hands this — day of July, 1908.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By BUZBEE & HICKS, [SEAL.]
Attorneys.
W. M. KAVANAUGH, [SEAL.]
W. L. HEMINGWAY, [SEAL.]
Sureties.

Approved this 14th July, 1908.
JOSEPH M. HILL,
Chief Justice Supreme Court of Arkansas.

Filed July 14, 1908.
PEYTON D. ENGLISH, *Clerk.*

274 *Writ of Error.*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Arkansas, and The Chicago, Rock Island and Pacific Railway Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was

drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said The Chicago, Rock Island and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to
275 the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of July, in the year of our Lord one thousand nine hundred and eight.

[The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.]

W. P. FEILD,
Clerk Circuit Court United States, Western Division, Eastern District of Arkansas.

Allowed.
JOSEPH M. HILL,
Chief Justice Supreme Court of Arkansas.

Filed July 14, 1908.
PEYTON D. ENGLISH, *Clerk.*

276 *Certificate of Lodgement.*

STATE OF ARKANSAS,
In the Supreme Court:

I, P. D. English, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 14, 1908, in the matter of the Chicago Rock Island & Pacific Railway Company versus The State of Arkansas.

1. The original bond of which a copy is herein set forth.

2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 20th day of July, 1908.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

277 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein the Chicago, Rock Island and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 14th day of July, 1908.

JOSEPH M. HILL,
Chief Justice Supreme Court of Arkansas.

Attest:
PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARKANSAS, *July 16th,* 1908.

We, attorneys of record for the state of Arkansas, the Appellee, and defendant in error, in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

WILLIAM F. KIRBY,
Attorney General,
LEWIS RHOTON,
Prosecuting Attorney,
Attorneys for State of Arkansas.

Filed July 14, 1908.

[Seal of the Supreme Court of Arkansas.]
PEYTON D. ENGLISH, *Clerk.*

278 *Return to Writ of Error.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within titled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this July 20, 1908.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

Statement of Costs.

Costs Circuit Court (see page 259)	$205.50
" Supreme Court:	
Transcript	75.00
Clerk's Fees	11.50
Printing Briefs, Appellee	15.00
	$101.50

Paid by Appellant.

Transcript:

Transcript to U. S. Sup. C't	$81.50

P'd by Pl't'ff in Error.

Clerk Sup. C't Fees	12.20
Binding	1.00

P'd by Pl't'ff in Error.

Attest:
PEYTON D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 21,291. Arkansas Supreme Court. Term No. 226. The Chicago, Rock Island & Pacific Railway Company, plaintiff in error, vs. The State of Arkansas. Filed August 6, 1908. File No. 21,291.

Supreme Court U. S.
FILED
MAR 13 1910
JAMES H. MCKENNEY
Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1909.

No. [redacted]

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*,

v.

THE STATE OF ARKANSAS, *Defendant in Error*.

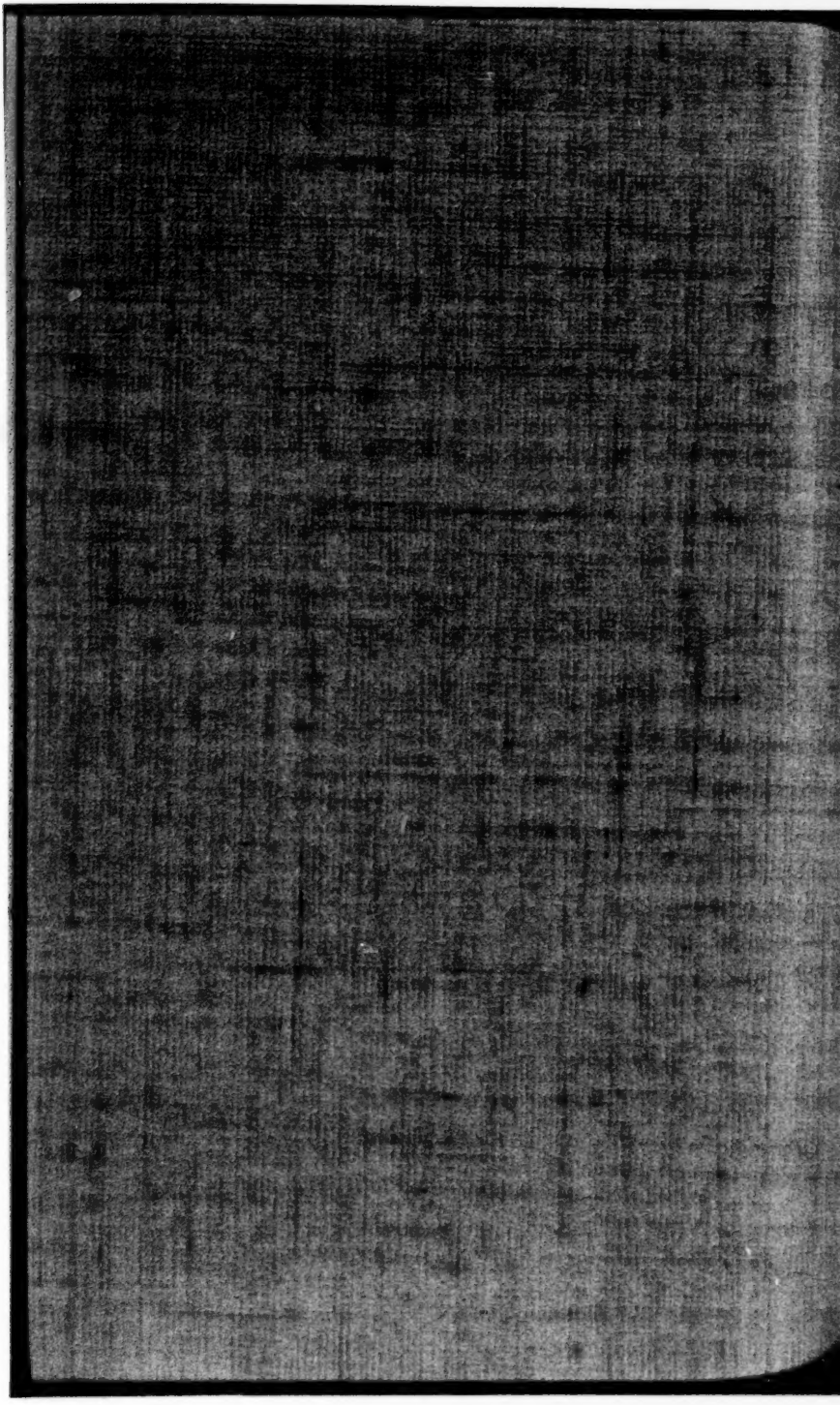
IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS S. BUZBEE,
For Plaintiff in Error.

EDWARD B. PEIRCE,
ERASMUS C. LINDLEY,
Of Counsel.

WESTERN PRINTING CO., LITTLE ROCK



IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 226.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.....*Plaintiff in Error,*

v.

THE STATE OF ARKANSAS..*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On March 28, 1907, the Legislature of Arkansas passed its Act No. 116 (hereinafter called the "Full Crew Act"), entitled "An Act Prescribing the Minimum number of employees to Be Used in the Operation of Freight Trains in This State, and Providing a Penalty for the Violation of This Act," reading as follows:

"Section 1. No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

"Sec. 2. This act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five cars, it being the purpose of this act to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train consisting of twenty-five cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, and three brakemen, but nothing in this act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this act.

"Sec. 3. Any railroad company or officer of court violating any of the provisions of this act shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this act shall not apply during strikes of men in train service of lines involved.

"Sec. 4. All laws and parts of laws in conflict herewith are repealed and this act shall take effect and be in force thirty days after its passage."

The State of Arkansas brought two suits against plaintiff in error, alleging that it had failed to comply

with said act in the operation of two of its trains, by failing to employ on said trains three brakemen.

The plaintiff in error filed its answers in said suits, alleging that the full crew act was contrary to the Constitution of the United States. The material paragraphs of said answers are as follows (Tr., p. 6):

II.

"And for further defense, defendant says:

"That the act of Arkansas, No. 116, entitled 'An Act to Prescribe the Minimum Number of Employees to be Used in the Operation of Freight Trains in this State, and Providing a Penalty for the Violation of this Act,' approved March 28, 1907, under which it is sought to recover from the defendant in this suit, is unconstitutional and void, for the following reasons:

"(a) Said act, in requiring that each freight train consisting of more than twenty-five cars shall be equipped with a conductor and three brakemen, regardless of any modern equipment, or automatic couplers, and air brakes, is arbitrary, unreasonable, and not a proper exercise of the police powers of the State.

"(b) Said act, in applying to freight trains of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length, grants privileges and immunities to companies and officers of court operating freight trains of less than twenty-five cars in length which are not granted to companies and officers of court operating freight trains of more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains of more than twenty-five cars in length which are not granted to conductors and brakemen employed on freight trains of less than twenty-five cars in length, and is, therefore, contrary

to and in conflict with Section 18, Article II, of the Constitution of Arkansas.

"(c) Said act, in applying to freight trains of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains of more than twenty-five cars in length and to conductors and brakemen employed by companies and officers of court operating freight trains of less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States."

III.

"(a) Defendant states that there are in the State of Arkansas, many companies and officers of court owning and operating lines of railroad more than fifty miles in length and operating thereon freight trains of more than twenty-five cars, and that there are many companies and officers of court owning and operating lines of railroad less than fifty miles in length and operating thereon freight trains of more than twenty-five cars.

"That while this defendant owns and operates more than fifty miles of railroad, it also owns and operates, in the State of Arkansas, many branches less than fifty miles in length, over which it operates freight trains of more than twenty-five cars; that the operation of said freight trains over said branches is in all respects similar to the operation of freight trains over lines of railroads of companies and officers of court owning and operating railroads less than fifty miles in length.

"(b) Said act, in applying to companies or officers of court owning or operating lines of railroad more than fifty miles in length and exempting companies or officers of court owning or operating lines of railroad of less than fifty miles in length, grants privi-

leges and immunities to companies and officers of court owning and operating lines of railroad less than fifty miles in length which are not granted to this defendant, and to other companies and officers of court owning and operating lines of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed by companies and officers of court owning and operating lines of railroad more than fifty miles in length, which are not granted to conductors and brakemen employed by this defendant and other companies and officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section 18, Article II, of the Constitution of Arkansas.

"(c) Said act, in applying to companies or officers of court, owning or operating lines of railroad of more than fifty miles in length, and exempting companies or officers of court operating lines of railroad of less than fifty miles in length is a denial of the equal protection of the laws to this defendant and other companies, and officers of court operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"(d) Said act, in applying to this defendant and to other companies and officers of court, operating lines of railroad more than fifty miles in length, and exempting companies and officers of court owning and operating lines of railroad less than fifty miles in length, is a denial of the equal protection of the laws to conductors and brakemen employed by companies or officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States."

IV.

"Defendant alleges that it operates within the State of Arkansas six hundred and fourteen miles of railroad; that said line of railroad consists of main track and several branches of less than fifty miles in length; that it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are of more than twenty-five cars in length; that some of said trains are operated upon its main line and some of said trains are operated upon its branches of less than fifty miles in length; that the fines imposed by said Act of Arkansas No. 116, approved March 28, 1907, are such that if defendant failed to comply with said act, on each of its freight trains over twenty-five cars in length, operated in the State of Arkansas, the fines to which it would be subject would amount to a large sum, to-wit; About $12,500.00 per day, and, if continued during the time necessary to test the validity of said act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said act are, therefore, so excessive and burdensome as to deprive the defendant of its right to have the validity of said act tested by the courts, and have the effect of depriving the defendant of its property without due process of law and of denying to it the equal protection of the laws; that said act is, therefore, contrary to and in conflict with Article II, Section 9, of the Constitution of Arkansas, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

V.

"Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necesisty of brakemen going between the cars and could be stopped by the application of the air brakes by the engineer of said train without the intervention or assistance of the conductor or brakemen, as required by act of Congress, and the order of the Inter-

state Commerce Commission, made thereunder; that it had employed on said train a conductor and two brakemen and that the employment of another brakeman on said train was unnecessary, because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said act, in attempting to require the defendant to employ three brakemen on said train, attempted to require the defendant to expend a large amount of money for a useless and unnecessary purpose, and to deprive the defendant of its property without due process of law, and is, therefore, in violation of and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States."

VI.

(a) "Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used solely for the transportation of freight from points in the State of Arkansas and points in other territories and States west of the State of Arkansas, to Memphis, in the State of Tennessee, and other points beyond the State of Arkansas, and, therefore, was engaged in moving interstate traffic, into and through the State of Arkansas, and that said act, in requiring the defendant to equip said train with three brakemen, is an attempt to regulate commerce among the several States, and is, therefore, contrary to Section 8, Article I, of the Constitution of the United States, and is contrary to and in conflict with the act of Congress, approved March 2, 1893, and amended April 1, 1896, entitled 'An Act to Promote the Safety of Employees and Travelers Upon Railroads by Compelling Common Carriers, Engaged in Interstate Commerce, to Equip Their Cars With Automatic Couplers and Continuous Brakes, and Their Locomotives With Driving Wheel Brakes, and for Other Purposes,' and the act of Congress approved June 11, 1906, entitled 'An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and Common Carriers Engaged in Com-

merce Between the States and Between the States and Foreign Nations to Their Employees,' and the act of Congress, approved June 29, 1906, entitled 'An Act to Amend an Act Entitled "An Act to Regulate Commerce," approved February 4, 1887, and All Acts Amendatory Thereof, and to Enlarge the Powers of the Interstate Commerce Commission,' and other acts of Congress, which were passed pursuant to the power vested in Congress by said Section 8, Article I, of the Constitution of the United States.

"(b) Defendant states that said act is void, because the subject matter thereof has been legislated upon by the Congress of the United States, by the acts hereinbefore referred to."

In one of the suits it was admitted that, in addition to the interstate commerce carried upon said train, plaintiff in error also carried intrastate commerce between points in the State of Arkansas. In other respects the cases are identical.

In the trial court the State demurred to the answers of plaintiff in error, and said demurrer was sustained as to all of said answers, except paragraph five.

A trial was had upon paragraph five of the answers and testimony taken thereon. The rules of the Supreme Court of Arkansas required that an abstract of this testimony be made and filed as a part of the argument in the case. As a consideration of the testimony may be of benefit to this court in passing upon the questions involved, we will, for the convenience of the court, submit the abstract filed in the Supreme Court of Ar-

kansas as a supplement to this brief and refer, in argument, to such parts of the testimony as may be necessary.

The trial court rendered judgment against plaintiff in error in both cases and, on appeal, this judgment was affirmed.

SPECIFICATION OF ERRORS.

"First. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116, of the Legislature of Arkansas, of 1907, was valid. The validity of said act was denied and drawn in question by the appellant, the Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'

"Second. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116 of the Legislature of Arkansas, of 1907, was valid. The validity of said act was denied and drawn in question by the appellant, the Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'

"Third. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116 of the Legislature of Arkansas, of 1907, was valid. The validity of said act was denied and drawn in question by the appellant, the Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section 8, Article 1, of the Constitution of the United States, vesting in Congress the power 'to

regulate commerce with foreign nations and among the several States and with the Indian tribes.'

"Fourth. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116 of the Legislature of Arkansas, of 1907, was valid as applied to each of the trains sued upon in these actions. The validity of said act, as applied to each of said trains, as sued upon in this action, was denied and drawn in question by the appellant, the Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section 8, Article I, of the Constitution of the United States, vesting in Congress the power 'to regulate commerce with foreign nations and among the several States, and with the Indian tribes.'

"Fifth. The Supreme Court of Arkansas erred in holding and deciding that Act No. 116 of the Legislature of Arkansas, of 1907, was valid. The validity of said act was denied and drawn in question by the appellant, the Chicago, Rock Island and Pacific Railway Company, on the ground of its being repugnant to that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall 'deprive any person of life, liberty or property without due process of law.

"Sixth. The Supreme Court of Arkansas erred in affirming the action of the trial court in rendering a verdict against the appellant, the Chicago, Rock Island and Pacific Railway Company.

"Seventh. The Supreme Court of Arkansas erred in not reversing the judgment of the trial court" (Tr., p. 161).

POINTS AND AUTHORITIES.

I.

THE FULL CREW ACT OF ARKANSAS IS UNCONSTITUTIONAL BECAUSE IT UNDERTAKES TO REGULATE INTERSTATE COMMERCE AND IS REPUGNANT TO SECTION EIGHT, ARTICLE ONE, OF THE CONSTITUTION OF THE UNITED STATES.

Sherlock v. Alling, 93 U. S., 102.

Hall v. DeCuir, 95 U. S., 487.

Railway v. Husen, 95 U. S., 465.

Gibbons v. Ogden, 9 Wheaton, 1.

Atlantic Coast Line v. Wharton, 207 U. S., 328.

Act of Congress approved February 4, 1887.

Texas & Pacific Railway Co. v. Interstate Commerce Commission, 162 U. S., 197.

Act of Congress approved March 2, 1893.

Johnson v. Southern Pacific Railway Co., 196 U. S., 1.

Act of Congress approved March 3, 1901.

Act of Congress approved March 3, 1903.

Act of Congress approved February 23, 1905.

Joint Resolution of Congress of June 30, 1906.

Act of Congress approved March 4, 1907.

Report of Interstate Commerce Commission 1905, p. 78.

Act of Congress approved April 22, 1908.

Act of Congress approved June 29, 1906.

Sinnot v. Commissioners of Pilotage of Mobile, 22 Howard, 227.

Henderson et al. v. Mayor of New York, 93 U. S., 274.

Inman Steamship Co. v. Tinker, 94 U. S., 238.

Bond v. Turck, 95 U. S., 463.

Wisconsin v. Duluth, 96 U. S., 387.

Smith v. Alabama, 124 U. S., 465.

Stoutenburgh v. Hennick, 129 U. S., 148.

G., C. & S. F. Ry. v. Hefley, 158 U. S., 98.

Interstate Commerce Commission v. Detroit, Etc., Ry., 167 U. S., 633.

Asbell v. State of Kansas, 209 U. S., 251.

State v. C., M. & St. P. Ry. Co. (Wis.), 117 N. W., 686.

State v. Mo. Pac. Ry. Co., 111 S. W., 500.

II.

THE FULL CREW ACT, AS APPLIED TO INTERSTATE COMMERCE, IS ARBITRARY, UNREASONABLE AND CONTRARY TO SECTION EIGHT, ARTICLE ONE, AND THE DUE PROCESS CLAUSE OF SECTION ONE, OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

St. L., I. M. & S. Ry. Co. v. Taylor, 210 U. S., 281.

Railroad Co. v. Husen, 95 U. S., 465.

Houston & Texas Central Railroad Co. v. Mayes, 201 U. S., 321.

McNeill v. Southern Railway Co., 202 U. S., 543.

III.

THE FULL CREW ACT IS REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

Yick Wo v. Hopkins, 118 U. S., 356.

G., C. & S. F. Ry. v. Ellis, 165 U. S., 150.

A., T. & S. F. Ry. v. Matthews, 174 U. S., 96.

Cotting v. K. C. Stock Yards Co., 183 U. S., 79.

Connolly v. Union Sewer Pipe Co., 184 U. S., 540.

ARGUMENT.

I.

THE FULL CREW ACT OF ARKANSAS IS UNCONSTITUTIONAL BECAUSE IT UNDERTAKES TO REGULATE INTERSTATE COMMERCE AND IS REPUGNANT TO SECTION EIGHT, ARTICLE ONE, OF THE CONSTITUTION OF THE UNITED STATES.

The trains, which it is alleged plaintiff in error failed to equip as required by the Full Crew Act, were being used for the transportation of interstate commerce, one of the trains being used solely for interstate commerce and one being used jointly for interstate commerce and intrastate commerce. The Supreme Court of Arkansas held that there was no material difference between the two cases (Tr., p. 146), and in this view we concur. It was agreed that both trains were subject to the acts of Congress and the rules of the Interstate Commerce Commission made thereunder (Tr., p. 25).

We contend that the act, as applied in these cases, is such a positive and direct regulation of interstate commerce as is prohibited by the reservation of the power to Congress to regulate interstate commerce. In making this assertion, we are not unmindful of the fact that there are many requirements which the police

power of the State can make, and which incidentally affect interstate commerce, but which are not deemed to be regulations of commerce within the prohibition of the Constitution. The effect of this act, however, as here applied, is to prohibit the operation of trains engaged in interstate commerce unless those trains are equipped in accordance with the terms of the act. This effect upon interstate commerce is direct and positive and not merely incidental in the sense in which many acts of a general nature are incidental in their effect upon such commerce. That the regulation of these matters is within the power of Congress is well settled.

In the case of Sherlock v. Alling, 93 U. S., 102, this court said:

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on."

In Hall v. DeCuir, 95 U. S., 487, the court said:

"But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

And in Railway v. Husen, 95 U. S., 465:

"Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is

given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transporation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it. * * *

"Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation."

These principles have been enunciated by the court in every opinion upon the subject, from the case of Gibbons v. Ogden, 9th Wheaton, 1, to the present time, and were stated by the court in the case of Atlantic Coast Line v. Wharton, 207 U. S., 328, in the following language (p. 334):

"That any exercise of State authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious."

The Supreme Court of Arkansas did not hold that the act was not a regulation of commerce, but rather contended that it was a matter in which the State had jurisdiction concurrent with Congress, or until Congress had acted, and sustained the act for the reason, as stated in the opinion (Tr., p. 159), that:

"There is no direct interference between the legislation of Congress relied upon and the act in question. Each may stand, each cover its own field; and there is no apparent ground of conflict possible in the operation of the two acts, for they do not reach the 'precise subject matter.'"

With this view of the Supreme Court of Arkansas we differ, and contend that, even if it be admitted, for the sake of argument, that the State ever had jurisdiction, that jurisdiction is now lost because Congress has legislated upon the precise subject matter and has taken control over all matters relating to the equipment, both mechanically and personally, of trains engaged in interstate commerce and of the safety of employees and travelers in such commerce.

In support of this contention we call the attention of the court, briefly, to the history of legislation by Congress upon this subject.

On February 4, 1887, Congress passed an act entitled "An Act to Regulate Commerce." This act is very comprehensive in its terms, and this court in passing upon its intent and purpose, in the case of Texas and Pacific Railway Company v. Interstate Commerce Commission, 162 U. S., 197, said (p. 212):

"It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (except commerce wholly within a State) as well that between the States and Territories as that going to or coming from foreign countries.

"In a later part of the section it is declared that 'the term *transportation* shall include all instrumentalities of shipment or carriage.'"

On March 2, 1893, Congress passed an act entitled, "An Act to Promote the Safety of Employees and Travelers Upon Railroads by Compelling Common

Carriers Engaged in Interstate Commerce to Equip Their Cars With Automatic Couplers and Continuous Brakes, and Their Locomotives With Driving Wheel Brakes, and for Other Purposes." The act makes it unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine, in moving interstate traffic, not equipped with a power driving wheel brake, and appliances for operating the train brake system, or, to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer of the locomotive controlling such train can control its speed without requiring brakemen to use common hand brakes for that purpose. It further provides for the equipment of cars with automatic couplers "which can be uncoupled without the necessity of men going between the ends of the cars," with grab iron handholds, drawbars, etc., and also provides a penalty against the carrier, and a remedy to an injured employee, for a violation of the act.

The reasons of the Legislature of Arkansas for the passage of the full crew act are not given, but the only theory upon which the State has any authority to pass the act is that it is necessary for the protection and safety of the employees engaged in the operation of trains. It will readily be seen that this is the identical subject covered by the Safety Appliance Act above referred to. This view is sustained by the

language of the court in the case of Johnson v. Southern Pacific Railway Co., 196 U. S., 1, as follows (p. 19):

"President Harrison, in his annual messages of 1889, 1890, 1891 and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: 'It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.'

"And he reiterated his recommendation in succeeding messages, saying in that for 1892: 'Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly sixteen per cent of the deaths occurred in the coupling and uncoupling of cars, and over thirty-six per cent of the injuries had the same origin.' "

On March 3, 1901, Congress passed an act requiring common carriers, engaged in interstate commerce by railroad, to make to the Interstate Commerce Commission monthly reports of all collisions of trains, or where any train or part of a train accidentally leaves the track, "and of all accidents which may occur to its passengers or employees while in the service of such common carrier, and actually on duty, which report

shall state the nature and the causes thereof and the circumstances connected therewith." The Interstate Commerce Commission was authorized to prescribe the method and form of making such reports.

31 United States Statutes at Large, p. 1446.

It had already been made the duty of the Interstate Commerce Commission, by the "Act to Regulate Commerce," approved February 4, 1887, to make a report to the Secretary of the Interior, to be transmitted to Congress of all such information and data collected as might be considered of value in the determination of questions connected with the regulation of commerce "together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary."

An examination of the reports of the Interstate Commerce Commission for the years subsequent to 1901, shows that this Commission made reports and recommendations to Congress, basing them upon the reports received by it from the railroad companies, as well as information received from other sources, and that these reports went into detail as to the equipment and operation of trains, injuries to employees, and the causes thereof.

The Safety Appliance Act of March 2, 1893, was amended April 1, 1896, and March 2, 1903, by extending its provisions to meet new conditions, and on March 3, 1903, an act was passed making an appro-

priation for the appointment of an assistant to the Attorney General, Assistant Attorney General, and confidential clerks, to perform such duties as might be required of them by the Attorney General. This appropriation has been continued until the present time. While the act does not specify the duties of the employees to be appointed, the appropriation is paid from the appropriation made for the enforcement of the provisions of the act entitled, "An Act to Regulate Commerce," approved February 4, 1887, and it is well known that their duties are to look after the enforcement of said act.

On February 23, 1905, Congress passed an act, entitled, "An Act to Promote the Security of Travel Upon Railroads Engaged in Interstate Commerce, and to Encourage the Saving of Life." This act authorizes the President to prepare and bestow medals upon persons who, by extreme daring, endanger their own lives in saving or endeavoring to save lives from any wreck, disaster or grave accident, or in endeavoring to prevent such wreck, disaster or grave accident upon any railroad within the United States engaged in interstate commerce. An appropriation for the enforcement of the act was made out of the appropriation for the enforcement of the acts to promote the safety of employees and travelers upon railroads.

On June 30, 1906, Congress, by a joint resolution, directed the Interstate Commerce Commission to inves-

tigate and report on the uses of, and necessity for, block signal systems and appliances for the control of railway trains in the United States; and on March 4, 1907, Congress appropriated $50,000.00 to enable the Commission to carry out the purposes of the joint resolution of June 30, 1906.

On March 4, 1907, just twenty-four days prior to the passage of the Full Crew Act by the legislature of Arkansas, Congress passed an act entitled, "An Act to Promote the Safety of Employees and Travelers Upon Railroads, by Limiting the Hours of Service of Employees Thereon." By section 2 of this act it is made unlawful for any common carrier to require or permit any employee, subject to the act, to be or remain on duty for a longer period than sixteen consecutive hours, etc., and the act further limited the hours of service of employees engaged in transmitting, receiving, or delivering orders pertaining to or affecting train movements, etc., to nine hours in any twenty-four hours.

The Supreme Court of Arkansas in its opinion holds that Congress has not legislated upon the subject of the Full Crew Act, but, in our humble opinion its conception of the subject of the act is too narrow and restricted. It is true that Congress has not passed any act directly regulating the number of brakemen to be employed on freight trains, but we take it that, strictly speaking, the subject of the Full Crew Act of

Arkansas is not the number of brakemen to be so employed. As an abstract proposition, the State of Arkansas has nothing to do with the number of brakemen to be employed on any train. It can only enact a regulation of this character as an incident to the attainment of the real object of the act, to-wit, the safety of employees engaged in the operation of trains. The acts of Congress and the Full Crew Act were all passed for this purpose. They seek to attain the same end, but by different methods. Congress says the proper method of accomplishing the object is to require the adoption of certain safety appliances and limit the number of hours which any employee may work; the State says the proper method is to increase the number of brakemen. Congress says brakemen have been required to perform too much work and incur too many dangers, because the appliances provided for the performance of their duties were insufficient and the hours of their service were too long; the State says the real difficulty lies in an insufficient number of brakemen. Congress has provided for an increase in the number of men to be used in the operation of trains by limiting the number of hours trainmen can work, and requiring that at the expiration of such time they be relieved by other employees; the State seeks to accomplish the same object by requiring a larger number of employees to work at the same time. The subject of the two branches of legislation

is the same, and the object to be attained is the same.

The Safety Appliance Act of Congress is entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads, by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars," etc. The act of Congress of February 23, 1905, is entitled "An Act to Promote the Security of Travel upon Railroads Engaged in Interstate Commerce," etc. The act of Congress of March 4, 1907, is entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon." If the title of the Full Crew Act had stated its object, as the titles of the acts of Congress do, its title would be "*An Act to Promote the Safety of Employees and Travelers Upon Railroads,* by Prescribing the Minimum Number of Employees to be Used in the Operation of Freight Trains in this State, and Providing a Penalty for the Violation of this Act." [The proposed amendment to the present title is shown by italics.] This would have been a very appropriate title for the Full Crew Act, and shows that it covers the same subject and was passed for the same object as the acts of Congress.

But, suppose we consider the subject of the different acts in its narrowest sense. The Full Crew Act requires that trains shall be equipped with three brakemen. It does not define the duties of said brakemen,

and we must assume that the word is used in its ordinarily accepted meaning. What is a brakeman? The definition given by the Century ~~Digest~~ Dictionary is: "A man whose business is to apply the brakes on a railroad train which are operated by hand." The definition given by the Standard Dictionary of the English Language is: "One who attends to a brake or brakes, as on a railroad car or in a mine." We also know, from common knowledge, that it is the duty of brakemen to attend to the coupling and uncoupling of cars. It is seen, therefore, that the subject of that part of the Full Crew Act requiring the employment of three brakemen is the handling of brakes and the coupling and uncoupling of cars. Turning to the Safety Appliance Act of March 2, 1893, we find that section 1 prohibits the running of any train "that has not a sufficient number of cars in it, so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." The Full Crew Act, therefore, directs that brakemen shall perform a duty which has been imposed, by the Safety Appliance Act, on the engineer. Again, section 2 of the the Safety Appliance Act provides that cars shall be equipped with couplers, "coupling automatically by impact." It thus conclusively appears that the subject of the provision of the

Full Crew Act requiring three brakemen has been completely covered by the act of Congress.

It may be that Congress will find it expedient in the future to make some regulation in reference to the number of brakemen to be employed, but the State has no authority to supplement the acts of Congress in this particular.

The regulation of hours of work necessarily regulates the number of employees and serves the same purpose as a direct regulation of that point.

If any doubt could be entertained of the fact that Congress has now entered upon the policy of regulating these matters itself, and with the same object the State apparently has in view, that doubt will be removed by an examination of the reports required by Congress of the Interstate Commerce Commission, and upon which reports the legislation above referred to is based.

The Interstate Commerce Commission makes annual reports to Congress. In each of said reports the commission gives to Congress complete information in reference to accidents and the causes thereof, and these reports are from time to time made the basis of recommendations to Congress. For instance, we find, in the report of the commission for 1905, at page 78, under the head of "Accidents," the following with reference to hours of labor:

"Another important feature of railroad operation is the hours of labor of railroad employees, especially

of enginemen, conductors and other trainmen, telegraph operators and signalmen. All these men are constantly charged with delicate and responsible duties, and they should never be on duty except when in good physical and mental condition. The need of a high standard in this respect and of care on the part of supervisory officers to see that proper regulations are maintained and obeyed is quite generally recognized, and a considerable number of railroads have prescribed rules limiting the hours of work and providing suitable rest periods; but these rules often appear to be very poorly enforced. Evidence of overwork appears frequently in the accident reports. Besides those cases of men remaining on duty because of wrecks or snow storms, or other emergencies, there is much irregularity in every-day train service.

"The disposition of men to work beyond reasonable limits of physical endurance for the sake of facilitating the business of the railroad or to increase their earnings may be seen in other departments than the train service. Signalmen, who usually work regular turns of twelve hours each, sometimes take each other's places in case of sickness or an unexpected call of a man away from his home, and thus remain on duty thirty-six hours at a time.

"This defect in the service, due to overwork, is frequently discovered in conjunction with a deficiency of another sort—inexperience. Men who have been but a few months in the service, and who have yet much to learn concerning some features of their duties, should be required to comply with the rest-time regulation with the most scrupulous care; yet it often happens, as has been shown in the accident records, that new men, admittedly less competent for their duties on that account, are the very ones who have been put to the additional test of working overhours.

"In the year now reported the bulletins have shown, for the first time, cases of disaster to freight trains due to the errors of enginemen under the influence of liquor. Accidents are also reported nearly

every month in which the engineman or conductor at fault had fallen asleep, although he had not been overworked in the line of duty. His physical disability was due, presumably, to something that was wrong in his condition or conduct while off duty. Investigation by competent experts is needed to enable the public to know the full truth about cases of this kind."

This recommendation was followed by the passage of the act of March 4, 1907. Another evidence of the intention of Congress in this regard is the passage of the Employers' Liability Act, approved April 22, 1908. Other acts have been passed by Congress placing in the hands of the Interstate Commerce Commission almost the entire detail of the management and operation of railroads engaged in interstate commerce. This is especially true of the Hepburn Act, approved June 29, 1906.

In the case of Sinnot v. Commissioners of Pilotage of Mobile, 22 Howard, 227, a statute of Alabama required that steamboats, in navigating the waters of that State, before they left the port of Mobile should file in the office of the probate judge of Mobile a written statement of the name of the vessel, also of the owners, their place of residence and their interest in the vessel, and imposed a fine for failure to comply with the act. The defendant was master of a vessel which had complied with the Act of Congress of February 17, 1793, providing for the enrollment and license of vessels engaged in the coast trade. [The effect of this act was considered in the case of Gibbons v. Ogden, 9

[Wheaton, 1.] The court held the statute of Alabama unconstitutional, and said:

"The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this without regard to the source of power whence the State legislature derived its enactment.

"This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the States. They surrendered this power to the general government; and to the extent of the fair exercise of it by Congress the act must be supreme."

In the case of Henderson et al. v. Mayor of New York, 93 U. S., 274, in dealing with a statute of New York, authorizing the collection of a per capita tax of passengers on vessels coming into the port of New York, the Supreme Court said:

"We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, State or national; that by providing a system of laws in these matters applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled."

In Inman Steamship Company v. Tinker, 94 U. S., 238, the court, in dealing with another statute of New

York, which undertook to levy a tax on tonnage ships, said:

"The warrant for such competent legislation may be found in that immense mass of police and other powers which the States originally possessed, which they have not parted with, and which still belong to them; or it may in some cases be found among those which the States may exercise, but only until Congress shall see fit to act upon the subject. The authority of the State then retires, and lies in abeyance until the occasion for its exercise shall recur."

In Bond v. Turck, 95 U. S., 463, the court said:

"He then says that if Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over the several navigable streams into which the tide flows, the State law would be void."

In Wisconsin v. Duluth, 96 U. S., 387, the court, in referring to the power of Congress to regulate commerce between the States, used the following language:

"And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the State, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying conformity, that when Congress has by any expression of its will, occupied the field, that action is conclusive of any right to the contrary asserted under State authority."

In the case of Smith v. Alabama, 124 U. S., 465, the court had under consideration a statute of Alabama requiring locomotive engineers to be examined and licensed by a board to be appointed by the governor.

The court found that Congress, at that time, had not legislated upon the subject-matter of the act, and sustained its constitutionality, but, in delivering the opinion, summed up the law as follows:

"The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by State laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases the existence of the power to regulate commerce in Congress has been construed to be not only paramount, but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States."

The State relies on the above case as an authority in support of the proposition that the present act is one within the power of the State to pass, but we call the attention of the court to the fact that at the time of the decision in the Smith case Congress had not passed any act looking to the protection and safety of employees on interstate trains, or indicated in any manner the policy of taking unto itself the regulation

of this subject, while at the present time Congress has adopted a consistent and vigorous policy along that line.

In Stoutenburgh v. Hennick, 129 U. S., 148, the court announced the following doctrine:

"The conclusions announced in the case of Robbins were that the power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national, or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicating its will that the subject shall be left free; that in the matter of interstate commerce the United States are but one country, and must be subject to one system of regulations, and not to a multitude of systems."

From these authorities it must be conclusively presumed that when Congress passed the acts providing for the mechanical equipment of trains engaged in interstate commerce, and limiting the hours of service to be performed by employees engaged in operating said trains it would have, at the same time, provided for the personal equipment of said trains if it had been deemed proper to do so, and its failure to make such provision must be taken as an affirmative declaration of its intention to leave this matter "free and unfettered by any positive regulations."

If there could be any doubt about the Full Crew Act and the acts of Congress operating upon the same subject-matter, that doubt will be removed by an examination of the testimony taken under paragraph five

of the answer. That testimony shows conclusively that the purposes of the requirements of all the acts are the same, and the alleged necessity for the Full Crew Act depends almost wholly upon the compliance or non-compliance of the railroads with the acts of Congress.

Congress is keeping fully advised of the situation by annual reports from the Interstate Commerce Commission, and by recommendations from the commission as to additional legislation needed. If it decides from these reports and recommendations that it is necessary to regulate the number of men to be employed in the handling of interstate trains, it will do so, just as it has regulated the hours of work to be performed by such men. Until it does so, however, it is not within the power of the State to supplement the acts of Congress already passed.

In the case of G., C. & S. F. Ry. v. Hefley, 158 U. S., 98, the court said:

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' Henderson v. New York, 92 U. S., 259, 271. 'Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever,

encroach upon the powers of the general government or rights granted or secured by the supreme law of the land.' New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority as defined by the Constitution, the latter must prevail.' Morgan v. Louisiana, 118 U. S., 455, 464.

"It is unnecessary to pursue this discussion further. The state statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The State statute must, therefore, give way."

See also—

Interstate Commerce Commission v. Detroit, Etc., Ry., 167 U. S., 633.

In the case of Asbell v. State of Kansas, 209 U. S., 251, the court sustained a law of Kansas providing for the inspection of cattle on the ground that it did not conflict with any law of Congress, but, in referring to an Act of Congress, said (p. 258):

"There can be no doubt that this is the supreme law, and if the State law conflicts with it the State law must yield. But the law of Kansas now before us recognizes the supremacy of the National law and conforms to it."

The Full Crew Act of Arkansas does not recognize the supremacy of the National law, but, on the contrary,

expressly provides that it must be obeyed "regardless of any modern equipment of automatic couplers and air brakes"; in other words, regardless of the Federal law.

It is also in direct conflict with the Acts of Congress, because it provides for the braking of trains and the coupling and uncoupling of cars in a manner contrary to the manner provided by Congress.

In the case of State v. C., M. & St. P. Ry. Co. (Wis.), 117 N. W., 686, the Supreme Court of Wisconsin held invalid an act of Wisconsin limiting hours of labor of railway employees, because the subject of the act had been covered by legislation of Congress, and in doing so used the following language:

"It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a State will be valid so far as not antagonistic to a Federal law. The question is more properly one of jurisdiction over the subject, the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the States of such jurisdiction and authority, but action by Congress upon the pacticular subjest is deemed an assertion of the Federal power, a declaration of the policy that the subject shall be under Federal and not State regulation, and that, therefore, the power shall no longer rest in the State to exercise that authority which by the Constitution of the United States was surrendered to the Federal government when and if Congress deemed its exercise advisable."

This opinion clearly supports our contention that the fact that Congress has entered upon the *policy* of regulating the matters in question is a bar to further State regulation.

The principle is also recognized by the Supreme Court of Missouri in the case of State v. Mo. Pac. Ry. Co., 111 S. W., 500, where the court held an Act of Missouri limiting hours of service invalid, and used the following language:

"In our opinion the comity that should exist between State and Federal legislative power prohibits our taking that ungracious and narrow view. Whether the Federal act is constitutional or not we may not decide—such prerogative is lodged elsewhere. With the wisdom of Federal exercise of police power in the matter in hand we have nothing whatever to do—that is a matter for Congress. It is sufficient for us to know that uniformity in police regulations involving interstate commerce seem in the last few years, under pressure of current events, to have called for Federal legislation—a sample of which is the Automatic Coupling Act lately under review in Johnson v. Railroad, 196 U. S., 1, 25, Sup. Ct., 158, 49 L. Ed., 363; Schlemmer v. Railroad, 205 U. S., 1, 27, Sup. Ct., 407, 51 L. Ed., 681."

The Supreme Court of Arkansas further errs, in our opinion, by holding that there is no inconsistency between the Acts of Congress and the Full Crew Act. It assumes that the Full Crew Act should be sustained, if the railroads can comply with its provisions without violating the provisions of the Acts of Congress. This,

we contend, is not correct. We may concede, for the sake of argument, that a compliance with the Full Crew Act does not necessitate a violation of the Acts of Congress, but the Supreme Courts of Missouri and Wisconsin, as we have shown, held invalid acts of those States prohibiting the employment of men, under certain conditions, for a longer period than eight hours, while the prohibition of the Act of Congress was for the employment of longer than nine hours. Congress, in the present instance, might pass an act requiring that not less than five men be employed on any train. The State could require not less than six. There would be no inconsistency in the sense that it was necessary to violate one law to comply with the other. The true test is, has Congress indicated an intention of assuming jurisdiction over the subject matter. If so, any act upon the same subject matter by the State is inconsistent and in conflict with the exercise of such jurisdiction by Congress. This is what we understand the courts to mean in the cases heretofore decided, and in the cases referred to and cited by the Supreme Court of Arkansas. If this contention were not true, the situation would be this: Congress has adopted a complete and comprehensive method of studying the needs of legislation in reference to the safe equipment and operation of trains and of passing such legislation as it may deem necessary.

It must be assumed that, having entered upon this policy, it will pursue it in a proper and consistent manner; that, if legislation is needed, it will be passed; if not needed, it will not be passed. Now, if the authority of the State is to continue concurrent with that of Congress, the State may supplement every Act of Congress by passing acts upon the same subject matter, but affecting different details. Congress may require automatic coupling appliances; the State may require the employment of human agency to make couplings. Congress may regulate the character of the running gear of the train; the State may regulate the character of the body of the cars. Congress may require automatic air brakes; the State may require, in addition, steam brakes. Congress may require that every locomotive engineer shall serve an apprenticeship as fireman; the State may require that he shall serve an apprenticeship as machinist. Congress may require the flagging and protecting of trains to be done by automatic block signals; the State may require that it also be done by switchmen stationed at certain points on the track, or by additional employees on the train. In our opinion, such a conflicting method of regulation was in contemplation by the framers of the Constitution, and it was to prevent same that the power to regulate interstate commerce was reserved to Congress. It may be conceded, for the sake of argument, that, prior to the time Congress entered upon the policy of regulating these

matters, the State had jurisdiction. The cases relied upon by the State are cases which were decided prior to that time, but, now that Congress has entered upon this policy, State legislation must give way, and the silence of Congress on any particular detail of the subject must be considered as an announcement that that detail must not be regulated by legislative enactment.

II.

THE FULL CREW ACT, AS APPLIED TO INTERSTATE COMMERCE, IS ARBITRARY, UNREASONABLE AND CONTRARY TO SECTION EIGHT, ARTICLE ONE, AND THE DUE PROCESS CLAUSE OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This question is closely interwoven with the questions argued in the foregoing paragraph of this brief, but there are some additional reasons for holding the act unconstitutional, which we desire to present under this head.

Paragraph five of the answer of plaintiff in error alleged that its trains were equipped with safety appliances in accordance with the Acts of Congress and the orders of the Interstate Commerce Commission, made thereunder; that there were employed on each of said trains, in addition to other employees, two brake-

men, and that there were no duties connected with the running and operating of said trains to be performed by an additional brakeman. The Supreme Court of Arkansas holds that (Tr., p. 160) "if it is a fair subject of controversy whether the act is promotive of the safety of the employees of a common carrier on a public highway, and of the passengers and travelers on said highway, to have such legislation, then the act of the legislative department in the premises is conclusive." This is probably a correct statement of the law as applied to those matters which are in the exclusive control of the State, but when the legislation involves the regulation of insterstate commerce it is within the province of this court to examine for itself the question of the seasonableness of an act and its practical operation, and to determine from that investigation whether or not the State Legislature has acted within the bounds of its jurisdiction.

R. R. v. Husen, 95 U. S., 465.

Atlantic Coast Line v. Wharton, 207 U. S., 328.

We trust the court will read the abstract of testimony submitted as a supplement to this argument, but for the purpose of the argument we call attention to the following features of the testimony:

It appears from the testimony of all of the witnesses that it has been the custom of all railroads in the Southwest, with the exception of the St. Louis, Iron Mountain and Southern Railway Company, to operate

through freight trains with only two brakemen. All of the witnesses who testified, and who had had experience in the operation of trains with two brakemen, stated that two brakemen were amply sufficient for their safe and practical operation; that the work of brakemen was greatly diminished by the equipment of trains with automatic couplers and air brakes; that prior to the use of such equipment it was necessary for trains to be stopped by the use of hand brakes, and for all cars to be coupled and uncoupled by brakemen going in between the cars; that since the use of such equipment, in accordance with the Acts of Congress and the rules of the Interstate Commerce Commission, the starting and stopping of trains was done wholly by the engineer, and without the intervention of brakemen, and that cars were coupled automatically, without the necessity of brakemen going between them, although it was still necessary for a brakeman to be at point of coupling in order to make proper connection of air hose.

The witnesses for the State testified that there were many occasions arising in the operation of trains when there was necessity for a third brakeman. It will be noted, however, that the witnesses who testified on this point had never operated trains with less than three brakemen, and therefore did not testify from actual experience as to operation of trains with two brakemen. Instances were given of the necessity for the presence of three brakemen upon trains, but nearly

all of these instances were emergencies arising from accidents, or from the failure of the railroad companies to comply with the Acts of Congress and the rules of the Interstate Commerce Commission. For instance, it was said that it was necessary to handle trains into terminals by hand brakes, because of the giving out of air pumps, but it was admitted that the rules of the Interstate Commerce Commission required trains, under such circumstances, to be stopped at the first siding until the pump was repaired, and that, if this rule was complied with, the necessity for handling the train into terminals with hand brakes would not arise.

We call attention to the fact that the requirements of the Acts of Congress are absolute in terms, and no excuse is taken for a failure to comply fully with said requirements.

St. L., I. M. & S. Ry. Co. v. Taylor, 210 S. W., 281.

Another point urged by the witnesses was that when drawheads pulled out, three brakemen were required to chain up a car. This necessity also relates directly to appliances required by the Acts of Congress and the Interstate Commerce Commission. On this point there was testimony tending to show that cars could not be chained up by two men in a practical manner, but there was nothing in the testimony to show that the presence of three men was necessary for safety, and we do not believe this court would sustain

an act, even under the guise of a police regulation, simply for the purpose of relieving men of additional work, which did not involve the safety of either the men or the public. It may be that if three or four or five men were employed, they could perform a certain piece of work with less labor, and in less time, than two men, but this is not a matter which concerns the State, unless it has direct reference to the safety and health of the public.

One of the witnesses contended that sometimes the bursting of the air hose caused the train to stop with such force as to injure and disable one of the trainmen, and that there should be three men provided for this emergency. If this sort of accident occurs with such frequency as to make it necessary, or even reasonable, to provide an additional man to meet the emergency, then Congress has acted very unwisely in requiring railroads to furnish air brakes, for, instead of decreasing, it has increased the danger to the men employed, but if this be true, we still insist that the matter is one for Congress, and not the State, to remedy.

It is insisted that sometimes emergencies arise in which a third man can be used to advantage in flagging trains, yet in all of these cases it appears that so far as the protection of the train and the public is concerned, two brakemen, with the other members of the crew, are ample.

On the part of the plaintiff in error the testimony showed that the St. Louis and San Francisco Railroad Company, the St. Louis Southwestern Railway Company and the plaintiff in error, all operating extensive lines of railroad within the State of Arkansas, and many other large railroads operating in different parts of the United States, had never used more than two brakemen in the operation of through trains, and had never found necessity or reason for the use of a third brakeman. It appeared from the testimony of officials of the Iron Mountain road that the use of a third brakeman on that road was considered unnecessary, but because of certain pressure brought to bear by the trainmen's orders the road had been unable to dispense with the use of the additional brakeman. It was not contended, however, that the Iron Mountain road had been operated with any less danger or with fewer accidents than the other railroads named.

The most that can be successfully urged, from the testimony taken, is that there may sometimes be emergencies in which a third brakeman could be used to advantage, just as in case of accident it is frequently necessary to send for wrecking crews, section crews and other employees to assist in the temporary emergency, but it must be admitted that in the ordinary operation of trains, and assuming, as this court must, that the railroad operating the trains complies with the Acts of Congress and the rules of the Interstate Commerce

Commission, there is no reasonable necessity for the employment of said additional man.

It is well known that the western half of the State of Arkansas is mountainous, while the eastern half is level. If it should be admitted that in the western half of the State, where railroads are constructed with more or less curves and grades, there is necessity for the use of three brakemen, it would not at all follow that the same necessity existed in the eastern half of the State, where the railroads are built without grades and curves, and can be operated with a minimum number of employees.

The uncontradicted testimony shows that the track of plaintiff in error, over which the trains involved in this case were operated, to-wit: its track between Little Rock and Hopefield, is level and straight. (See testimony of W. T. Tyler, Tr., p. 70.)

The Full Crew Act contains no provision based upon the necessity for the use of three brakemen. It is made to apply in all cases, and, in the language of the act, "regardless of any modern equipment of automatic couplers and air brakes." Can there be any stronger evidence of the unreasonable intent of the act than this provision? The beneficent effect of mechanical appliances for the prevention of accidents has long been recognized. The Acts of Congress are evidence of the high regard in which they are held by the people of the United States, and the reports of the Interstate

Commerce Commission show that the application of safety appliances to the operation of trains has largely decreased injuries and deaths resulting from their operation. The Legislature of Arkansas, however, proposes to put a ban upon the use of these appliances, and upon any further effort to perfect or invent other labor-saving or life-saving appliances. It says to the railroads, "No matter how perfect may be your appliances, no matter how small the risk of danger connected with their use, no matter whether you have any use for the employment of a given number of men or not, you must employ these men." What more is needed to show that it was intended to legislate upon the identical subject-matter which has been legislated upon, from time to time, by Congress, and to show that the provisions of the act, as applied to interstate commerce, are absolutely arbitrary and unreasonable?

The act requires the equipment of trains with three brakemen, but does not state the services to be performed by any of said brakemen.

The duty of brakemen, heretofore, has been to couple and uncouple cars and assist in the stopping of trains. Witnesses for the State made a strenuous effort to show that three of them were still necessary, at times, for this purpose, but the act says that they must be employed, whether necessary or not. Certainly this provision goes beyond any reasonable necessity for accomplishing the desired end.

In the case of Railroad Company v. Husen, 95 U. S., 465, this court had under consideration an act of the Legislature of Missouri prohibiting certain cattle from being driven into the State at specified times. The court held the act to be unconstitutional, because it went beyond the necessity for the exercise of the police powers of the State, and said:

"They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government. * * *

"In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. Yeazel v. Alexander, 58 Ill., 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the Legislature, and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. *And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion.*"

We have italicized the last sentence, above quoted, because the rule there announced is very material in considering the case at bar.

To illustrate this point further, even at the risk of repetition: The Safety Appliance Act of Congress says that the braking shall be done by the engineer, and that the coupling of cars shall be done automatically. Notwithstanding these provisions of the Act of Congress, the Full Crew Act of Arkansas requires that three brakemen shall be employed for the same purpose. It is not sufficient to say that these brakemen may be required to assist the engineer, conductor or fireman. The act under consideration is a penal act, and must be strictly construed. It can only be construed as requiring the employment of three brakemen to perform the work of brakemen. It makes this provision, however, regardless of whether there is work for the brakeman to perform or not. The railroads cannot, in fact, have trains stopped and cars coupled and uncoupled by brakemen without incurring the penalties of the Acts of Congress.

The Legislature of New York of 1907 passed an act similar to the act now under consideration. The act was vetoed by Governor Hughes, because unconstitutional. The veto message of Governor Hughes is, of course, not the decision of a judicial tribunal, but it is the legal opinion of one of the eminent lawers of the United States. For the benefit of the court we quote the veto message in full:

"Albany, June 15, 1907.

"*To the Assembly:*

"I return herewith, without my approval, Assembly Bill No. 455 (Senate reprint No. 1338), entitled 'An Act to Better Protect the Lives of Railroad Employees.'

"This bill provides that it shall be unlawful for any railroad company in the State of New York 'that runs more than four freight trains in twenty-four hours,' to run over any part of its road outside of yard limits any freight train composed of more than twenty cars with less than a full crew of six persons, to-wit, one engineer, one fireman, one conductor and three brakemen; or a light engine, without cars, a crew composed of one engineer, one fireman, one conductor, or flagman, when running a distance of ten miles or more from starting point.

"According to present practices freight trains are very generally operated with a crew of five persons, and the object of this bill is to compel the employment of an additional brakeman. The necessity for this is said to lie in the fact that without three brakemen the freight trains are insufficiently manned, and that firemen are compelled to leave their places in all kinds of weather to throw switches when the two brakemen are required, respectively, to go ahead of and behind the train.

"This bill, however, upon the facts developed before me upon the hearing, and undisputed, is clearly unconstitutional. Such a measure should define the service required with suitable reference to circumstances and conditions, so that the law would apply in proper cases, and not otherwise. The bill takes no account of the differences between the different roads and parts of roads, in trackage and switching facilities, and of the fact that what may be necessary in the case of some railroads may be wholly unnecessary in others. In the case of the New York Central Railroad it was shown that the trackage and switching facilities on its main

lines were of such a character as to make unnecessary the employment of a third brakeman in accordance with the provisions of the bill. This was frankly conceded by supporters of the bill.

"To require the expenditure of a very large amount of money (estimated at several hundred thousand dollars annually) without necessity for the outlay, is simply arbitrary exaction and a taking of property without due process of law. The bill does not refer its requirements to any proper standard of necessity or provide any criterion by which its proper application under varying conditions is to be determined. It contains an absolute requirement which, upon the facts conceded before me, cannot be justified.

(Signed) "CHARLES E. HUGHES."

The act now under consideration "does not refer its requirements to any particular standard of necessity or provide any criterion by which its proper application under varying conditions is to be determined," but, on the other hand, "contains an absolute requirement," "regardless of any modern equipment of automatic couplers and air brakes," which, in effect, means absolutely regardless of necessity.

The case of Houston and Texas Central Railroad Company v. Mayes, 201 U. S., 321, was decided upon similar principles. A statute of Texas required railroad companies to furnish cars to shippers within a certain number of days, the only proviso being that the law "shall not apply in cases of strikes or other public calamities." The court condemned the statute, because too rigid in its requirements, and in the course of the opinion said:

"Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce. * * *

"While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration, except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather. * * *

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

An interesting case upon these questions is McNeill v. Southern Railway Company, 202 U. S., 543.

If it be argued that the requirement to operate trains with three brakemen is one which should be general in its application, and not based on varying condi-

tions, then we submit that it comes within that class of laws which, from their nature, are National in character, and the silence of Congress thereon amounts to an expressed declaration that the subject shall be left free from any legislation. In either view of the case, the present act must be held unconstitutional.

III.

THE FULL CREW ACT IS REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

We consider that the grounds urged in the foregoing paragraphs of this brief are sufficient to sustain our contention that the act in question is unconstitutional, and, for that reason, will call the attention of the court but briefly to the question of its constitutionality as tested by the equal protection clause of the Constitution.

Section 2 of the act provides that it "shall not apply to any railroad company or officer of court whose lines are less than fifty miles in length." The Supreme Court of Arkansas, in its opinion (Tr., p. 157), held that to construe the act strictly would make it "plainly unconstitutional," and, in an endeavor to sustain the act, construed it as follows:

"The proper construction to place on the act, and that renders it valid, is: If the short line is in fact used as a continuous line with the main line, or in any other way as a part of it, and not as a separate line merely

connecting with it, then it is a part of the line. But if it is a mere connecting line, separately operated—operated as an independent short line is operated—although owned by the company owning the larger line, then it would not be within the statute."

The principles involved in this question have been before the court many times, and the principles themselves are well sustained, but their application is sometimes difficult. An examination of the authorities will show that the decision in each case is made to turn upon its own particular facts, and the citation of authorities is principally valuable for the purpose of bringing to mind the rules to be applied in determining whether or not any particular statute is repugnant to the Constitution. The doctrine now settled is that a discrimination or classification, to be sustained, "must always rest upon some difference which bears a reasonable and a just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Yick Wo v. Hopkins, 118 U. S., 356.

G., C. & S. F. Ry. v. Ellis, 165 U. S., 150.

A., T. & S. F. Ry. v. Matthews, 174 U. S., 96.

Cotting v. K. C. Stockyards Co., 183 U. S., 79.

Connolly v. Union Sewer Pipe Co., 184 U. S., 540.

The theory of the State in passing the act is that it is necessary for the safety of the employees operating freight trains. A demurrer was sustained to the paragraphs of the answer alleging unconstitutionality

on the ground that it was repugnant to the equal protection clause, and, consequently, testimony could not be taken thereon. In the testimony taken, however, under paragraph five of the answer, witnesses testified very fully as to the dangers connected with the operation of trains, but not a witness undertook to say that the danger of operating trains on a line of more than fifty miles in length was any greater than the operation of like trains over lines less than fifty miles in length, and we venture to say that it cannot be shown that the length of the railroad has anything to do with the risk incurred by brakemen.

It is said that no man lives unto himself. Certain it is in these days that no railroad operates unto itself. Every railroad, no matter how short, is simply a connecting link between one or more longer lines of railroad, and it is a matter of common knowledge that the business handled on some of the short lines is much greater than that handled on the longer lines. It may be that if the distinction had been made as between railroads causing their employees to operate trains for more or less than fifty miles, or other distances, there would have been some reason for the distinction, but under the act as it now stands train crews on a line forty-nine miles in length may be compelled to handle freight trains without any brakeman at all back and forth upon said line, until they have handled trains for the full distance capable of being traversed by a freight crew in a single day, while, on the other hand, its con-

necting line of railroad, which may be over fifty miles in length, but which may only require its crews to operate a train one way a day over a division less than fifty miles in length, is required, under the terms of the act, to equip its trains with three brakemen.

The case is not like the cases involving acts regulating coal mines, or even cases providing for the comfort of passengers on trains. Every coal mine operates unto itself, and passengers do not travel back and forth upon the same line, as is done by employees operating trains.

Again, the construction of the act by the Supreme Court of Arkansas does not relieve the act from its discrimination in favor of short lines of railroad. It attempts to hold the act inapplicable to branch lines of railroad under fifty miles in length, which are operated as independent short lines, but it does not, and cannot, make the act applicable to lines of railroad less than fifty miles in length, which are operated in all respects similar to lines of railroad of more than fifty miles in length. It is this discrimination, we submit, which is fatal to the act.

Respectfully submitted,

THOMAS S. BUZBEE,

For Plaintiff in Error.

EDWARD B. PEIRCE,

ERASMUS C. LINDLEY,

Of Counsel.

SUPPLEMENT.

Abstract of Testimony Taken Under Paragraph Five of Answer.

DEFENDANT'S TESTIMONY.

"It was agreed that the trains in question in this case were subject to the Acts of Congress and the rules of the Interstate Commerce Commission made thereunder, and that there was on said trains an engineer, fireman, a conductor and two brakemen. This agreement goes to the fifth paragraph of the answer" (p. 25).

W. S. TINSMAN testified (p. 26), in substance, as follows:

I live at Evanston, Illinois, and am assistant general manager of the defendant. I started in the railroad business in May, 1891. [This statement was later corrected to 1881.] I started as a call boy, was an operator for two or three years; was then trick dispatcher; chief dispatcher, trainmaster, superintendent, general superintendent, and from that to the position I am now holding. I have not been connected with any road except the defendant. I was located at Little Rock, as general superintendent of the defendant, from June, 1905, until September, 1906. I had charge of all lines of the company in the State of Arkansas.

"Q. In the operation of through freight trains over the Rock Island in Arkansas and elsewhere, how many brakemen are employed?

"A. Two.

"Q. Suppose that you employ on those freight trains another brakeman—a third brakeman—what duties would there be for him to perform, assuming that the two brakemen already employed comply with their duties?

"A. None that I can think of."

We have now on the train two brakemen, a head brakeman and a rear brakeman. The head brakeman works at the forward end of the train, looks after getting his engine out and coupling up, and takes care of the forward end of the train (p. 26). The rear brakeman has similar duties with regard to the rear end of the train. He has to protect the rear end. He goes out and stops following trains in case they are stopped out on the line. Neither of these brakemen has anything to do with the mechanical part of stopping and starting the train. It is not necessary for them to set the hand brakes under any ordinary circumstances. The rules of the Interstate Commerce Commission require that we have seventy-five per cent of the equipment air brakes, and that is sufficient to control the train; even less would do that. Under certain circumstances, such as the train parting, the brakemen might be required to set the hand brakes on the rear end of the train. If there are any cars on the train not equipped with air, they are located on the rear end. That is necessary to get the air cars connected with the engine. Before the introduction of air brakes and automatic couplers on freight trains the brakemen had

nothing to do with starting the trains, except on signal, but in stopping the train, it was controlled by hand brakes. It was necessary, then, in stopping trains, to set the hand brakes on each car, and to set a sufficient number to control the train. The brakes had to be set on each car individually until enough were set to control the train. That is not necessary under the present equipment of trains. There were a few air brakes in use when I entered the railroad service, but not a great many. The Rock Island has used only two brakemen on their freight trains since my connection with it. I have been connected with the Rock Island since 1881, and at that time it only found use for two brakemen (p. 28).

CROSS-EXAMINATION.

I have never acted regularly as a conductor on a freight train. I have made a few trips, probably half a dozen. That was in 1890. I have never acted in the capacity of a brakeman. 1890 was before we had seventy-five per cent of air brakes, although on part of the line I was running at that time it was an unusual thing not to get sufficient air cars to take care of the train. If the cars are piped it is not necessary to put them in the rear end of the train. We have a few piped cars (p. 28). If we pick up a car that is not equipped with air brakes or piped, we have to shift it to get it in the rear. If it was piped it would fit anywhere. The best

equipment would be to have every car piped. We have a good many cars that are not piped and have no air brakes. They are used in the operation of trains. When I commenced working for the railroad our trains would average fifteen or twenty cars. I think the highest capacity we had at that time was 40,000. I cannot state the average number of cars on freight trains now operated on other railroads in Arkansas, but think our line (the Rock Island) would show an average of about thirty-two cars. We have many trains with fifty or sixty cars. I could not state the tonnage per car when we were operating fifteen to twenty cars to the train. I think our largest car was 40,000 and our smallest 24,000. I would say that the average would come somewhere about 25,000—from 30,000 to 40,000. I think now if we would get an average of 60,000 it would be about right. I do not know about the motive power in Arkansas ten years ago.

In the operation of freight trains on the Choctaw District of the Rock Island the brakemen have nothing to do with controlling the speed of the train or stopping or starting, that is governed by the engineer, under ordinary conditions. The company, in formulating its rules, tried to formulate rules that are best adapted to the operation of the train. If the train separated the brakeman would need to control it by the brakes on the hand brake cars. If the train breaks, that breaks

the air and sets the brakes. If the train breaks in two the train will stop itself (p. 30).

If they were all air cars on the train, and the train broke in two, it would not be necessary for the brakemen to use the hand brakes. I have been on trains that broke in two, and the brakemen did not undertake to stop them at all; there was no occasion for it. I have no particular train in mind. I have been on a great many that were delayed a great while.

"Q. There is a rule in the hands of brakemen which says: 'Brakemen must stop their trains at stations and control them in descending heavy grades, without waiting for the signal from the engineman, and must be careful to avoid the sliding or heating of the wheels.' Now, if the rule requires the brakemen to control the train at stations and on descending grades, don't that require the use of the hand brakes; and if that requires them to control the train on descending grades and going into stations, how is it that they have nothing to do with the speed of the train or stopping?

"A. I assume that rule was intended and was operative when it was necessary for the brakemen to assist in the stopping and controlling of the trains. Our rule has not been changed since the change of the per cent of air."

I think our rules were published in 1894, when we were required to use fifty per cent air. I cannot tell you the date the order of the Railroad Commission requiring seventy-five per cent went into force. That rule is in the book, but I know that the brakemen do not control the train with hand brakes.

The rule is in the book, but employees violate it. The explanation is that at the time the company started to put out their book they were only required to have twenty-five per cent of air cars; by the time the book was out they were required to have fifty per cent; then it was raised to seventy-five per cent. In getting a greater per cent of air the rule was not necessary.

It is deemed that seventy-five per cent of air is sufficient to control the train. We used to control the trains so as not to require the brakemen to touch a brake with much less than twenty-five per cent. It is my recollection that the original law contemplated that it would not be necessary for brakemen to go on top of the train to set a brake, and that law was to go into effect as soon as the railroads could get in position to do it. They were to fix twenty-five per cent; then seventy-five per cent (p. 33).

We do not now recognize the fact that on heavy grades the use of the hand brakes is necessary for the security of the train and the protection of the public. If the air brakes got out of fix they might need to use the hand brakes. They sometimes get out of fix (p. 34).

I believe I read a report of the Interstate Commerce Commission which stated that the air brakes are yet in an imperfect condition, and have not reached the conditions that they are always able to control the train. We have instances of the automatic air brake getting out of order once in a while on account of im-

proper handling of the air, but those things, I think, are explainable in the efficiency of the force (p. 34).

"Q. I will ask you, with a freight train, now, with the tonnage you have of 60,000, with a freight train of fifty or sixty cars, going down grade, can two brakemen control the train with hand brakes? I mean, if the air should give out on a descending grade, with that kind of a train, can two brakemen control it with hand brakes?

"Q. (By the Court). Could they control it as well as three?

"A. No, they couldn't. Of course, three could handle it quicker than two.

"Q. I will ask you if the air brakes have broke under that condition, if it would not be an impossibility for two men to control it with hand brakes, or might there be need for three?

"A. Yes, sir; sometimes."

I don't suppose any mechanism is perfect, but I don't recall any case now where the air gave out so we were unable to hold the train. If the air breaks it sets the brakes. If it should not it might be that three or four brakemen might not. If the train was going up grade I do not think there would be any possibility that two could not prevent the train running back down grade. I think we have a rule that if the air brakes do give out so they won't work the speed of the train should be controlled by the brakemen. That includes the failure of the hand brakes and also the pump on the engine. If the pump gave out the brakes would not

work. The train don't start out without being charged with air. I don't recollect that being done since 1904. We frequently send out to repair air brakes on the line. The train is standing on the sidetrack. The air pump does give out occasionally.

"Q. If it required two brakemen under the old system, with fifteen or twenty cars, with an average tonnage of 35,000, can you say that a freight train with thirty-two cars, with an average tonnage of 60,000, could be handled as well with two brakemen? If you should operate it, wouldn't three brakemen be necessary?

"A. On very little of our line. There are some places if two couldn't stop it, three couldn't stop it.

"Q. Would three do more than two?

"A. Yes, sir; maybe four couldn't.

"Q. Suppose your air gives out, can two control it as well as three?

"A. No, sir.

"Q. Do you think two men could control the train without air?

"A. Sometimes they couldn't; no, sir.

"Q. Then sometimes more than two would be necessary if your air gave out?

"A. I don't know that more than two would be necessary" (p. 35).

I don't know of circumstances under which a third brakeman would be required under our system. Under

certain circumstances three men would give additional braking power to the train and retard its action.

If a freight train left here with orders to go to Higgins five minutes before a passenger train coming into Little Rock was due there, and they left Sweet Home, and after getting some distance the air gave out, it was the duty of the rear brakeman to go back and flag. If the train stood there until the time was up for the other train, the head brakeman should go out and flag the front. I believe it is the duty of the fireman under our rules. If the rear brakeman protected the rear end and the head brakeman the front end, the conductor, fireman and engineer are there to manage the train.

If the fireman leaves the engine long enough, the engineer would have to take his place, but the question of having a third brakeman there to protect the train would not be a question of safety at all, as the train is standing still. When a train runs into a station where they haven't time to get on the switch, and trains have to saw by with the train coming from the other direction, it is the duty of the brakemen to protect both the front and rear end of the train. If they are in a station where they have to pick up cars they have to protect the rear end (p. 37).

Under our rules, whenever a train stops it is the duty of the brakeman to go back and protect the rear, and if a train is likely to come from the other direction,

to protect the front. That sometimes occurs. If they have to do switching under such circumstances, the conductor, fireman and engineer would give signals. It is the duty of the conductor to get his orders from the telegraph operator himself. If the front brakeman is out at the front and the rear brakeman at the rear, and the conductor at the office to get orders, the engineer and fireman are there to protect the train, but the train would not be doing anything (p. 38).

I do not know how far the light of the lantern can be seen giving signals through the foggy district of Arkansas. As far as I know the hand brakes on our freight trains are kept in the same good condition now as they were before we had air brakes (p. 38). It is necessary to use them in setting cars out.

If they were in a defective condition they would probably demand an additional amount of human strength to stop the train as quick as it did under the old system.

There has been a material increase in the amount of work done by railroads within the last six or seven years.

"Q. Now, then, is it not true that this increased amount of work that is to be done by the railroads has more than taken the place of the advantage furnished the brakemen by the introduction of the automatic couplers and air brakes? Is it not true that there is more work to be done now on freight trains by the conductor and brakemen than there was ten or fifteen years ago, in the work you were doing then?

"A. No, sir; not in my opinion. I haven't actually done the work, but it would be my opinion that the character of the work of the brakemen is lighter now than it was ten or twelve years ago."

At all times, in my experience, we have tried to move freight as fast as we could, but that does not necessarily increase the work of the brakemen (p. 39).

I do not know how much the average drawhead weighs now. I think two men could handle one of them. I think they are some larger than they used to be. I think drawheads are pulled out oftener now than under the old system (p. 38).

Under the old system the link would break before the drawhead would pull out. If the drawhead pulls out they put in a chain.. I think there is no question but two men could handle the chain. I do not know what a third man could do, except to have him there to work. It would be one more man to work.

When the train divides one man must stay with the rear of the train. He sets two or three brakes and the caboose, and goes back to protect the train. I don't see any danger in leaving the rear end while he is back flagging.

REDIRECT EXAMINATION.

The only danger to be apprehended to that train is the rear end, and that is protected by the man who goes back, and two men could not do that any better than one. If the air brakes gave out when the train is

in motion, or if the train breaks and there is no imperfection in the air, it sets the brakes automatically. If there is a break in any part of the train the brakes set immediately, without the assistance of the brakemen. Seventy-five per cent of air brakes is sufficient to control the train (p. 40).

If the hand brakes have to be set, they are set on the rear end, next the caboose. The rear brakeman would set these brakes. There is nothing to prevent the conductor from setting brakes, if necessary (p. 40).

The rule referred to requiring brakemen to control trains was gotten up at the time when that was necessary. There is no necessity for it now, and, as a matter of fact, in the operation of trains on the Rock Island, brakemen are not required to control the rear end of the train. I have not, nor to my knowledge has the road, censured or discharged a brakeman for failure to control the rear end of the train in a good many years.

While that rule is in the book of rules, it is not now in force, and is not complied with by brakemen.

Where it is necessary for a train to saw by at a station, the train heads into the switch, and there is nothing for the head brakeman to do except flag the train and protect it. It does not require any flagging to protect the train while on the sidetrack.

While the tonnage has been increased since I have been railroading, the grades have been reduced and

curves eliminated on many parts of the line. That is true on all parts of the line where heavy trains are operated. The air has also been applied to the engines, and they have a braking power now that they did not have at that time. The engines are also heavier, and when put into reverse motion are more able to hold the train now than then. It is easier to control an average train under present conditions than it was to control a train in 1881 (p. 41).

I have never had any experience with three men on through freight trains. We have never employed them on any railroad I have been with. None of the railroads that I know of in the Southwest employ three brakemen, except the Iron Mountain (p. 41). The Denver, T. P. & S. W., Santa Fe, Burlington, Chicago and Alton, N. W. & St. P. don't. In fact, I don't know of any railroad west of Chicago that employs three brakemen. It sometimes happens that a train will leave the track, and then it is necessary to have the section crew and wrecking crew to put it back. These are emergencies which might happen in the operation of trains, but do not ordinarily happen. I have never considered it necessary to carry facilities on trains to meet these necessities.

RECROSS-EXAMINATION.

The Choctaw road, from here west to the Indian Territory, is pretty crooked. The grade is one per cent maximum. I do not consider that a heavy tonnage line. I don't remember that the disobedience of that rule has ever been reported to me, but I have a personal knowledge that they are not handling trains by that rule (p. 42). If the train was going down grade, and the necessity arose for a brakeman to apply the brakes, and he didn't do it, I would discharge him for failing to take care of his particular work, and not for violating that rule (p. 42).

J. W. Higgins testified (p. 42), in substance, as follows:

I am now assistant general manager of the Missouri Pacific system. Have been engaged in the railroad service since 1879, as messenger, track laborer, switchman, operator, freight brakeman, conductor, assistant superintendent, superintendent, assistant general manager. I have had opportunity during these various employments to observe the operations of freight trains. I have been connected with the Burlington, Yazoo and Mississippi Valley, Grand Trunk, Missouri Pacific and Illinois Central, and it has been part of my business to observe the operation of freight trains during that period. Prior to the passage of the Interstate Commerce Act, in regard to safety appliances,

two brakemen were usually used on through freight trains. The passage of the law and the order of the Commission requiring seventy-five per cent of air and improved equipment has decreased the necessity for brakemen on the trains. Before the passage of the act and the rule requiring seventy-five per cent of air, the brakemen had all the duties as at present, and in addition had to stop trains with hand brakes and couple cars (p. 43).

Each car had its own brakes, and the brakeman would have to go from car to car, and sometimes, in winter, would have to coon them; that is, get down on their hands. Briefly, they had a landmark for each stopping place, and when they got to that they would go out and commence setting brakes, and go from car to car and set them. This was done with two brakemen. Today there are no links and pins, and the cars couple automatically, without requiring the brakemen to go between the cars to make the coupling, and the engineer is responsible for the braking of the train. He controls the train by air brakes from the engine. The brakemen now have to couple the engine to the train, protect the train by flagging, examine the train on siding and know that it is safe. They now have to use hand brakes very little (p. 43). In fact, not at all in stopping the trains ordinarily, at stations. They have to use the hand brakes when they set the cars out on sidetracks, and if

they leave the train setting on the main track they have to protect it from approaching trains.

With a train, under normal conditions, equipped as the Act of Congress and the rules of the Insterstate Commerce Commission require, with seventy-five per cent of air, there is no use on any of the roads in this State for a third brakeman on through freight trains, in my judgment.

CROSS-EXAMINATION

I acted in the capacity of freight conductor and brakeman on the Illinois Central Railroad. I have never been conductor or brakeman in Arkansas. They had one and a half per cent grades and six-degree curves on the Illinois Central where I worked. I worked from Chicago to Champaign, seven-tenths grade. Generally, it is a prairie country. That is the only place I ever acted as freight conductor or freight brakeman. I acted as freight conductor from 1884 to 1889; as brakeman prior to that time. Didn't use them on freight trains at all (p. 44). I never acted as brakeman on a freight train with air brakes. The Illinois Central from Chicago to Champaign is practically straight.

The Iron Mountain has three brakemen on its freight trains in Arkansas. I don't know how long they have had them. I have been acquainted with the manner of crewing freight trains since 1905. They have

had three brakemen on certain parts of the line since I have been acquainted with it. They haven't had three brakemen on all lines. I think they have three brakemen on the main line between the north Arkansas line and Texarkana, and whether they had or not between Little Rock and the Louisiana State line, when I came here, I don't know, but I know they didn't have a year ago, because we had to put them on. They haven't had three brakemen on all trains, nor they haven't today, except on the Fort Smith line. They didn't have three brakemen for about a year prior to the time this law went into effect. I don't know what per cent of the freight trains on the Missouri Pacific in Arkansas were equipped with three brakemen when this act of the legislature went into effect (p. 45).

Now, in the operation of freight trains with air brakes, the engineer is absolutely responsible for the stopping and starting of trains, and the brakemen have nothing to do with them. In the event of the complete failure of the air pump the brakemen would be responsible for stopping the train at the first sidetrack, where, under our practice, they would set it out. There is sometimes, in the operation of freight trains, a complete failure of the air pump. In my time I acted as one of two brakemen to stop trains of forty to fifty cars, and we would take anywhere from one-half to three-fourths of a mile, a mile or a mile and a half to stop a train, on a level track, with two brakemen. Three

brakemen would be able to stop it quicker than two, if they were properly located, but, as we do not know when emergencies would arise, he must at all times be located in the middle of the train, and I do not know that such third brakeman would be useful in the operating of freight trains at all times.

The Iron Mountain has a rule that requires brakemen to be on top of trains at least a mile before they get to a station, and on top of a train in descending and ascending grades to meet the emergencies that we have been speaking about. In these emergencies a third brakeman would not be useless if he was in the middle of the train, but if he was on the engine or caboose he would not be of any use. I do not agree that there is a possibility of the necessity of a third brakeman every time they go up or down grade and into every station (p. 46).

When there is a break in a train, accidentally or any way, the rules require that he secure the rear end of the train, but he could not very well stay with it and do the flagging. There is nothing that requires a man to stay right there with the rear portion of the train.

REDIRECT EXAMINATION.

When the rear of the train breaks off it is the practice to secure it with hand brakes and then protect the hind end of the train with a red light and go back and flag the rear end. In Rule 369 it says that the flagman

must always be left with the train, but he does not have to stay there. He is the man that goes back to flag and protect the rear end of the train. If he is on a grade he won't have to go far. On a one per cent grade 1,000 or 1,500 feet would be far enough back to stop the train. If the brakes were released it would be safer to have a man right there to stop it, rather than have a man run a thousand feet, climb on it and stop, but if the conductor thought he was running such a risk he or the other brakeman would take care of it. In promulgating rules we try to cover everything. We never figure that all men are normal. When a freight train stops at stations and sidings the conductor and brakemen inspect it to see whether or not it is in good order. The conductor has to go to the telegraph operator and get orders, but he walks over the train when he goes to the station. The conductor does not examine the boxes in going from the caboose to the telegraph office, unless they are hot. If they are hot you can tell it. When a box shows signs of being hot, and it usually does; by smell first. That is from the journals that have in them dope. I will state that on the Iron Mountain it is not a fact that one-half of the journals do not have dope in them. I do not think that that is possible to exist on any railroad (p. 48).

I am pleased to say that on the Missouri Pacific and Iron Mountain we have had very few wrecks and derailments caused by journals burning off. We have

an organization of inspectors to inspect the cars and pack those boxes, and if this is well done we have very few hot boxes. If your train crew examines them and takes care of them you will have very few hot boxes. Two men are sufficient to make that examination. I have had experience enough in the operation of trains in Arkansas to say that two men are enough. I have not had experience in braking, but I am operating trains. We had no more inspectors a number of years ago than we have today. If car inspectors have been dismissed in Arkansas, I don't know that their absence would put greater duties on the train crews. We have no great long divisions in Arkansas—125 miles, and some longer. We have inspectors at all terminals and some intermediate points. We have at Gurdon, I know. I think we have at Newport.

The flagman is to protect the rear end of the train while the train is on the main track. If they are expecting a train from the other direction, some member of the crew has to protect the train from the front. They do not find a number of cars on the sidetrack on the Iron Mountain. We have passing tracks on the Iron Mountain that are clear, and kept clear.

If I understand your case, an inferior train has to come to a station and take siding for a superior train; they have got to clear the main track five minutes before time for the superior train; the head brakeman goes ahead and throws the switch, and the stop they

make is only long enough to throw that switch, so there is no occasion for the rear brakeman to go back to flag if they pull in at once.

"Q. Take the circumstances of the wreck that occurred on the Valley Road at Higgins; the freight train left here with an order to clear at Higgins; they broke down on Fourche, so that they got to Higgins and couldn't clear by rule; when they got there and stopped there, one flagman had to go back and protect the rear, didn't he?

"A. Do you want me to assume that your statement is a fact?"

I want to say from our evidence, it is not a fact. If it was a fact, one had to go back and protect the rear, and one had to go ahead and protect the front. Taking your statement, as the head brakeman went by the switch he would stop and open the switch. You can't make rules for incompetent and careless men. Our information is that they didn't have time to make Higgins, and they didn't stop between here and there, and why they didn't get in there I don't know. They had three brakemen on that train and the thing happened (p. 50).

REDIRECT EXAMINATION.

They had three brakemen on the train that was wrecked at Higgins.

If there is a failure of the air we do not operate the train; we clear the first siding. There are occasional emergencies when you would need as many as

ten men. It is not regarded as good railroading to carry a crew of men along for emergencies. All of our trains have brakemen on them who would come under the operation of the rules.

We have three brakemen on local trains to facilitate switching and loading and unloading of freight, and we regard a third brakeman as useful where there is a great deal of station work, but it is wholly in the station work that he is useful, and not to start and stop trains on the road (p. 51).

We took off a number of brakemen in Arkansas, as well as other portions of the line, over a year ago, and received, naturally, a protest from the men—from their organization. We had a prolonged conference with a committee of the men, and Mr. Garrison and Mr. Morrison—Mr. Morrison is the Grand Master of the Brotherhood of Railroad Trainmen, and Mr. Garrison, I think is Chief Commissioner of the O. R. C.—and the negotiations are still pending.

"Q. Are they kept in service because the road regards them as necessary for the operation of its trains?

"A. No, sir; they are kept in service for the reason that in the negotiations with the men we didn't care to have trouble over it, and it was threatened. Our president and vice president were in Europe at the time, and we were not in position to press the matter to the extent we otherwise might have, and since the law was passed we consider it wise to endure the hardship until such time as the courts can pass on the question.

"Q. As an operating official, do you regard them as necessary to the management of these trains?

"A. No, sir.

"Q. As assistant general manager, you are an operating official?

"A. Yes, sir (p. 51).

RECROSS-EXAMINATION.

These negotiations were pending with the organization in July, 1906. At that time we had taken some of the men off. My recollection is that the act requiring automatic couplers and air brakes dates back to about 1893. Of course, it was a big undertaking to put them on. They were given seven years and seven months to get into effect. After we were required to put on air, from 1900 to 1906, it is my understanding we kept three brakemen on some parts of the road.

REDIRECT EXAMINATION.

The Interstate Commerce Commission was given the power to extend this act from time to time, and did extend it. The order increasing the air to seventy-five per cent took effect a short time ago on this road. As an operating official of the Iron Mountain, my duties require me to be familiar with the operation of trains in Arkansas. I am only responsible for transportation on this road (p. 52).

J. W. MAXWELL testified (p. 52) as follows:

I am general superintendent of the St. Louis Southwestern Railway Company. They operate across the State of Arkansas, from Missouri to Texas. I have been in the railroad business forty years, as messenger, operator, dispatcher, chief dispatcher, trainmaster, superintendent, general superintendent and assistant general manager. These positions placed me in direct connection with the operation of trains and the employment and duties of train crews in connection with the trains. The roads I have been employed on are the Pennsylvania; Missouri Pacific; Missouri, Kansas and Texas; Iron Mountain; Wabash; St. Louis Southwestern. I don't think there would be any use for the third brakeman in the operation of through freight trains (p. 53).

I know the practice of a great many roads in the Southwest in reference to the use of two or three brakemen on through freight trains, and they have only two brakemen, except on the Missouri Pacific-Iron Mountain system. That is the only one I know of that has three. The Missouri, Kansas and Texas used two brakemen on through freight trains. I have found in my experience that two brakemen, with the other employees, engineer, fireman and conductor, are competent and sufficient to handle the train (p. 53).

CROSS-EXAMINATION.

I have never acted as freight conductor or brakeman. The road I came from to the Cotton Belt had three brakemen on part of its local trains part of the year. Its local trains were equipped with air brakes. North of Pine Bluff, on the Cotton Belt, they can haul from forty to sixty cars. South of Pine Bluff, where the grades are heavier, twenty to thirty cars. I expect the Iron Mountain has more mileage in Arkansas than any other railroad system. So far as I know, the necessity for three brakemen would be as great on one road as the other. I don't think that in the operation of freight trains that emergencies arise where it would be safer and better to have three brakemen. There would be emergencies where the third brakeman could be used, but I don't know of any emergency where he would be necessary. I don't agree that he could be used to advantage in stopping the train. On the Cotton Belt the engineer is responsible for stopping and starting trains and controlling the speed. The brakemen have nothing to do with that in the ordinary and normal operation of trains. The rules require brakemen to be on top of trains at certain times and places. They can be there in cases of emergencies to pass signals from the rear end to the front end of the train. He is put on top of the train for that purpose very frequently (p. 55).

The rules require the engineer to test the air brakes on leaving terminal stations, and, after starting, to make slight application to see if they are working, and after they break the train to set out cars, and after the train is coupled up they test them again. The rules don't require the engineer to test the air on starting up or down grade, nor before he gets to a station. If he is a careful engineer he knows whether his air is working or not.

REDIRECT EXAMINATION.

The purpose of the Cotton Belt in having three brakemen on local trains is to assist in loading and unloading freight in less than car load lots, and to assist in switching. These trains do all switching at stations and at industrial plants. The local crew is a traveling switch engine. They are not provided for the safety of either the train or the employees, but to assist in the physical labor of loading and unloading the train and stopping at stations.

RECROSS-EXAMINATION.

I don't know how many car lengths a signal could be seen during foggy weather in the low section of the State. I have never been in a fog on the Cotton Belt in this State, but I suppose it is about the same as any other State. It would depend on the density of the fog. The signals could not be given any better with

three brakemen than with two. It might be done a little more rapidly if you had a line of men, but two men have been ample in all my experience, and I have been on trains in fogs (p. 56).

E. A. PECK testified (p. 56), in substance, as follows:

I am superintendent of the St. Louis Southwestern Railway Company. Have been in the railroad business over thirty years as operator, agent, trick dispatcher, chief dispatcher, trainmaster, superintendent and general superintendent. The roads I have been with are the Cleveland, Cincinnati, Chicago and St. Louis; St. Louis, Iron Mountain and Southern; St. Louis Southwestern.

I am familiar with the operation of freight trains and with the duties of the train crews in running through freight trains. I have lived in Arkansas six years, and have been connected with roads through Arkansas sixteen years.

On the Cotton Belt we have a conductor and two brakemen on our through freight trains. We have found that they are sufficient for the operation of those trains, and that there is no necessity or reason for the employment of another brakeman to operate those trains.

CROSS-EXAMINATION.

I have never acted as either conductor or brakeman.

MR. W. W. OGLINE testified (p. 57), in substance, as follows:

I am road foreman of equipment of the Rock Island Railway. My duties are to look ofter the operation of engines and train service, engineers and firemen. I have been in that position only about a month, but have been in the railroad business about twenty-three years. I started in as call boy, and from that to brakeman and firing and running locomotives. I have been connected with the Pennsylvania, Baltimore and Ohio and Rock Island roads. I went to work for the Rock Island six years ago the first of last June, at Trenton, Missouri, as locomotive engineer. I handle freight trains. On the trains I have handled there have been two brakemen. These trains run from twenty to sixty-five cars. Two brakemen have been sufficient at all times to properly handle the trains. During all that time I have found no occasion on which a third brakeman was necessary. Under the rules of the Rock Island it is the duty of the engineer to handle the brakes. Rule 36, in reference to the handling of brakes, is as follows:

"36. Hand brakes should not be used on cars having cut in air, except in emergency, but must be on cars left in sidetracks. When a part air train is being backed the hand brakes should be used on rear to prevent train from parting. Air brakes should not be

depended upon for holding trains or engine while standing.

"36*a*. All ordinary braking shall be done by the engineman, and hand brakes used only in emergency or in the event of air brake failure."

Since I have been in Arkansas I have been observing the handling of freight trains so as to be familiar with them. I have not found any necessity existing for the use or employment of a third brakeman on through freight trains.

CROSS-EXAMINATION.

I worked on the Cleveland, Loraine and Wheeling Branch of the Baltimore and Ohio, and on the Pennsylvania between Pittsburg and Cressline. I fired there eight years, and left the service in 1891. They did not use three brakemen while I was there, except on local trains. I have never performed the duties of freight conductor in Arkansas.

My interpretation of that rule is that in case the air brakes fail, the train must be controlled by hand brakes to the first sidetrack and get it in the clear. The brakemen don't have anything to do with stopping trains at stations under normal conditions. In addition to the rules for the engineer, the defendant also has rules for its brakemen. I think the rule that brakemen must stop their trains at stations and control them in descending heavy grades, without waiting for the

signal from the engineman, is in the hands of the brakemen now. The brakemen cannot control the movement of the train when you have air brakes operating.

If you have a train equipped with air it is under control of the engineer, and brakes that are set by hand take it out of the hands of the engineer. Subsequent rules provide for that, and subsequent rules are now in the hands of the brakemen (p. 59).

J. E. SNEDDIKER testified (p. 69), in substance, as follows:

I am superintendent of the Missouri Pacific Railway, located at Coffeyville, Kansas, in charge of the Southern Kansas Division. I have been in the railroad service since August, 1885. Have worked as brakeman, conductor, trainmaster, and superintendent. I served as freight conductor from June 8, 1888, until November 10, 1903. Prior to that time I had been brakeman. I was familiar with the operation of freight trains before their equipment with modern appliances, and I have been familiar with them since. Prior to the equipment with modern facilities, the brakemen looked after the supplies in the caboose, helped stop trains at stations and water tanks and anywhere the engineer would whistle for brakes, and did the flagging.

The first train I was on as brakeman there was two men used, and after that, on the Missouri Pacific, there was three brakemen. When we were operating with two brakemen we had about twenty loads, and we

did not have any trouble in handling the train. I was conductor after that and had three brakemen. Modern facilities make a difference in handling trains. I consider that two brakemen on through freight trains is enough to handle the train, and that is true of through freight trains of the present tonnage and equipment. There is no necessity for three brakemen, in my opinion.

CROSS-EXAMINATION.

Equipping trains with air brakes makes it much easier for the brakemen. Under ordinary circumstances they don't have to do any braking at all. They don't handle the train after the air gives out only to get it to the nearest siding. If the pump broke the air would stop the train right then and there. If you are on a descending grade five or six miles long, say middle way of that grade, and the pump would break, it would stop the train. As quick as it was ascertained what was the matter they would set the hand brakes and bleed the car, that is, let the air out. You would set the brakes enough while the train was standing to hold it, and you would have enough brakes set to handle the train until you could get down to the siding. When the train was bled it would be like a train without any air brakes at all. On some trains they now have fifty to sixty cars. In case of a break, the train would have to be handled by hand brakes. Two brake-

men would be sufficient to operate the train to the next siding. Three brakemen would not be any safer, because the brakes would be set before you started down, and they would have it under control, and if you had three brakemen, probably the third man would never get out of the caboose (p. 62).

When the air gives out, the rear man has to go back and flag the train. I have been in this same kind of fix, and one man can handle the train down to a siding. During all the time I was conductor on the Missouri Pacific I had three brakemen. I operated trains with less than three brakemen occasionally, but not regularly. If your train is going up grade and the air gives out the brakemen would apply the hand brakes, then bleed the train. They would have to control the train going down the other way, but wouldn't wait until it tipped over the hill to set the brakes. They would begin to set the brakes before it tipped over the hill.

I was conductor on the Missouri Pacific between Kansas City and Sedalia, a very hilly line. The conductor's place would depend on the conditions. If you are going to meet a superior train at a station, the head brakeman should be at the front of the train on top when coming to stations, and the rear brakeman at the rear end on top. If the train should part it would stop itself, and the rear brakeman would have to go back and protect the rear end of the train if it was stand-

ing on the main line. The train couldn't get away if the air is set in front, and you can't get five car lengths (p. 63).

The act of Congress requires seventy-five per cent equipped with air brakes. In sixty cars there would be forty-five equipped with air brakes. The cars without air are in the rear. If the fourteenth car from the rear end breaks in two, then the rear brakeman would have to stop the rear end. He would not go back to protect the train until he stopped the cars. If the middle brakeman was assigned there he would be ahead of the break, and wouldn't be where he could help the rear man. Of course if there was a train following, and you knew where the train was going to break, it would be better and safer to have two men there. We act on the presumption that there is a train coming behind.

You will not handle two cases of break in two the same. Your conditions will govern you. You might be in a position, if there was a flagman, train going down grade, and a train following ten minutes behind, to drift down and go further. It might be better to have a man there to control the speed and another one to flag.

REDIRECT EXAMINATION.

In the operation of freight trains we never put two brakemen on the rear end of a train. The third brakeman is assigned to the middle of the train. This is the

rule on the Missouri Pacific. In the case just put, that wouldn't help conditions. The third brakeman would be back of where there was air. When a brakeman is out behind flagging, and he is called in, they use torpedoes in day and fusees at night so they can go back to the train, and the train would still be protected.

RECROSS-EXAMINATION.

A fusee is a red light that burns about ten or eleven minutes. He would not light that fusee and leave it and go back until he was called in. It is important to start as quick as possible after calling the flagman in. As I said before, you would hardly have two break in twos where the occasions and conditions are the same. I cannot imagine any condition in Arkansas where you would want three brakemen on through freight trains.

E. A. WALKER testified (p. 65) in substance as follows:

I live at Trenton, Missouri, and am trainmaster for the defendant. I have been in the railroad business twenty years, with the Rock Island all the time. I was first in the civil engineering corps, then brakeman three years, and for sixteen years ran freight and passenger trains. I ran on the Colorado Division, Nebraska Division, Kansas Division, and El Paso Division. All on the Rock Island Railway. I had two brakemen on through freight trains and quite a number of locals. I never ran with three brakemen on through

freight trains. From McFarland to Kansas City we handled from forty to forty-five loads and about sixty empties. I find, in my experience, that two brakemen are sufficient to handle these trains. I never found it necessary to have three brakemen.

I was conductor before the introduction of automatic couplers and air brakes, and had two brakemen then, and never had any trouble in operating trains with two brakemen, and have found it the same way since.

CROSS-EXAMINATION.

I acted as conductor and brakeman from McFarland to Kansas City. I have never acted as conductor anywhere else. I have never had any experience in Arkansas as conductor or brakeman. The road from McFarland to Kansas City is a continuation of curves. Some of the local trains had three brakemen. They were not equipped with air brakes all the time. They had air brakes on the freight trains I was running the last few years.

Between McFarland and Kansas City is the only place I operated freight trains. I was first braking on the Colorado Division laying track and surfacing. I did front braking, and the grade was better than one per cent, and they had a few grades about one and a half per cent, and on the Nebraska Division about one

per cent. In Nebraska and Colorado it was very hilly and we used only two brakemen.

RECROSS-EXAMINATION.

I have never had any occasion for the use of a third brakeman. If railroads knew where to place the third brakeman where emergencies might arise they might be of some use.

W. T. TYLER testified (p. 67) in substance as follows:

I am general superintendent of the Second District of the San Francisco Railway. I have been in the railroad business since 1884, in the capacity of messenger, telegraph operator, dispatcher, brakeman, conductor, switchman, yardmaster, trainmaster, assistant superintendent, superintendent, and general superintendent. I have worked on the Wisconsin Central; Milwaukee, Lake Shore and Western; Northern Pacific; Great Northern; Iron Mountain, and Frisco.

I have been engaged in the railroad business in Arkansas about seven years, and am familiar with the conditions surrounding the operation of railroads in Missouri, Arkansas, Kansas, Texas, and Oklahoma. I do not consider that there is any difference in the conditions between these States. The conditions in Arkansas, I think, considering all the mileage in Arkansas, would be rather favorable, because most of the mileage in Arkansas is more level than in the other

States. A great part of Missouri is heavy grades and rough curvature. That is true of Oklahoma also, although there is a good deal of prairie there.

In my opinion the employment of three brakemen on through freight trains is not necessary to the safe and practicable operation of through freight trains having more than twenty-five cars.

CROSS-EXAMINATION.

I was with the Iron Mountain in Arkansas approximately five years, from 1900 to December 1, 1905. During that time the Iron Mountain had three brakemen on both local and through freight trains. I don't regard that there is any time that the third brakeman could contribute to the safety of the crew and train in any manner whatever, if the other two brakemen and conductor are performing their duties. There might be some emergencies where a third brakeman might be placed so he could contribute to the safety of the train in the same way that if the superintendent was on the train he might be of service by giving good advice to the conductor.

I don't know of any road that has a rule requiring the conductor to ride near the front of the train in meeting superior trains. The matter of where he will ride is largely a matter of his own judgment. If he is meeting a passenger train at a station at which that train stops and there is another train following him, he

would be very likely to remain on the rear end of the train, because there would be a greater likelihood of his being needed there. If the passenger train didn't stop at the station where he is meeting it, and it was just an ordinary case, he might go to the head end of the train or to the middle of the train, but, ordinarily, he would remain at the rear end (p. 68).

The engineer is on the head end of the train and he is equally responsible with the conductor. He is expected to be in on the siding and clear five minutes before the passenger train is to be there. If he is complying with the rules he will be there, and if he is not he will tell the head brakeman as soon as he throws the switch to go up and flag the passenger train. He is responsible as much as the conductor is.

The Frisco uses two brakemen on through freight trains. The number of cars handled by the Frisco in Arkansas on ordinary freight trains varies with the power. For instance, on that portion of the Frisco through Fort Smith, which is the mountainous part of the line, we handle from twelve to fifteen cars. We have the same power that they had twelve or fifteen years ago. On the line between Thayer and Memphis the track is comparatively level; we have in service there the same engines that they had twenty years ago; they haul about twenty cars. They tell me they used to haul about thirty-five cars. We are getting new engines now of larger capacity, and some now have

forty and forty-five cars. In the Third District, with which I am connected, they haul about forty-five cars. That is in this State, part of it.

REDIRECT EXAMINATION.

I can't say at this time why the Iron Mountain uses three brakemen. I have not been connected with the Iron Mountain for about two years, but during the time I was with the Iron Mountain the matter of taking off the third brakeman was considered. The third brakeman was considered unnecessary, and I have in mind one or two cases where he was regarded as a menace. The matter was considered, but from matters stated between the orders at meetings it was deemed not desirable to get into any trouble with the organization, and it was thought better to let it go along as it was then, but as I say they were not considered necessary, and it was very much desired to do away with the third brakeman. I have never known any road, except the Iron Mountain, to use three brakemen on through freight trains. As a matter of fact, the third brakeman was put on as a woodpasser when they burned wood in the engines. That is what they tell me, and is covered by correspondence.

I am familiar with the character of the Rock Island from Little Rock to Hopefield. It is very level; very little grade. The track is level and straight; very little curvature.

RECROSS-EXAMINATION.

I have never been over the line from Little Rock west. I do not know when wood went out of use. There were protests against taking off the third brakeman. The Missouri Pacific system had three brakemen on its system outside of Arkansas at the time I was with them.

REDIRECT EXAMINATION.

There was no rule on the Iron Mountain, as I recollect, as to where the brakemen would be stationed. The understanding, I believe, was that the head man would be at the head of the train, and the middle brakeman in the middle of the train, or nearly so, and the rear brakeman on the rear of the train. It was generally the case, however, that two were in the caboose, and the other on the engine.

When they first began equipping trains with air brakes it was very slow; say the trains would first have from six to eight cars, then ten or twelve, then twenty. During that time there was considerable danger of trains breaking in two from being less than half equipped with air, and the middle brakeman was expected to be in the middle of the train, because the break was most likely to occur near the middle of the train.

About four years ago Mr. Gould undertook to make a circular that middle brakemen should ride in the mid-

dle of the train. That circular was objected to by the orders for the reason that a man couldn't ride there in winter weather, and it was explained that they could change off, and they still complained, and said it was not necessary, because the train was supplied with air brakes, so the circular was called off. We were never able to get the middle man to ride on the middle of the train. We were not able to get the orders to agree to dispense with the third brakeman.

PLAINTIFF'S TESTIMONY.

W. C. TURNER testified (p. 71) in substance as follows:

I am chairman of the general committee of the Order of Railway Conductors of the Missouri Pacific system. That includes the Missouri Pacific system operating over the States of Illinois, Missouri, Arkansas, Kansas, Nebraska, and Colorado. I have occupied that position the last time for two years. Prior to that I had it for six years. I was conductor on the Ohio and Mississippi for four years, from 1874 to 1878. On the Missouri, Decatur and Evansville, brakeman for two years and conductor for three years. I was freight conductor for two and a half years on what is now the Frisco line from Springfield to Thayer, and I have been conductor on the Iron Mountain since April 1, 1886. All freight, with the exception of two years I was in the passenger service. I was on the Iron Mountain

from St. Louis to Poplar Bluff. During my service as freight conductor on the Iron Mountain I had three brakemen on some parts of the system, and two brakemen on some parts. They have three brakemen on the Fort Smith road from Alexandria, Louisiana, to Kansas City, including the river line. I think the Missouri Pacific has more mileage in Arkansas than all the others.

The Iron Mountain operates from Texarkana to the Missouri State line; the Memphis branch from Knobel to Memphis; the Helena branch from Wynne to Helena; from Memphis to Bald Knob; the Fort Smith line from the Arkansas line to the Territory line, and the El Dorado line from Gurdon to El Dorado, the White River line from Newport to the Missouri line.

I have been acquainted with the equipment of these lines, with reference to the number of brakemen, since 1886. They have had three brakemen on the Missouri Pacific, with the exception of the Memphis branch. That applies to both local and through trains. I candidly say that three brakemen are almost absolutely necessary for the safe operation from the standpoint of crew and public. I am acquainted with the equipment of freight trains on the line generally with reference to the number of brakemen prior to the adoption of air brakes and automatic couplers, and with the labor that is to be performed by the crew since the adoption of the air brakes and couplers. The amount of work required

of the crew, over what it was prior to the application of the air brakes and automatic couplers, has increased at least fifty per cent to the brakemen and conductor (p. 73).

"A. The conductor's duties have increased by the increased tonnage of the train, and the increased number of cars, and the additional reports he is compelled to make since the introduction of the air brakes and coupler and the additional power of heavy engines. In the olden days when we had the link and pin coupler and hand brakes the conductor made a report showing the number and initial of the car, where taken and where left, and the seals and number of miles hauled. Today he has to take the number and intial of the car, where taken, where left, kind of car, weight of car, total tonnage of car, and he must reduce that to pounds on all of his reports, besides showing the seal of each car. If he sets out a car at any point and breaks the seal and takes it up again, he has to show the new seal on it. He has twice the distance to walk to get orders that he had in the old days, and he has double the amount of breakage, pulling out of drawheads, chaining up of cars, that they had in the old days. The brakeman, while he has been relieved from the actual work of setting the brakes to stop the train, except in emergency cases, his duties have increased, because he has double the number of boxes to examine, double the number of cars to inspect at each stop. They have these cars to chain up with chains that it takes from two to three men to handle, especially some of the new cars while they are hard to chain up. The rigging is a hard thing to go through, especially at night. You will find transoms with very small holes that you have to put that chain through, and it will require one man to display a light so that you can find it, and there is no one man that can handle those chains, and hardly two, because they have to get underneath the car and in between the axle and the truck frame in order to get that chain on the car" (p. 73).

It is a daily occurrence that drawheads pull out at night, and it is necessary for the train crew to repair the breakage. When that happens the first thing that the conductor does is to see that the rear brakeman has gone to flag, then he has the other brakeman and himself to carry the chain from the caboose to wherever the break may occur, probably forty car lengths or fifty. The conductor and the brakeman will carry that chain to the break and put the chain on the car and chain it up in order to get it out of the way. The conductor and one brakeman cannot do that by themselves with any degree of safety. Three men are required with the chain that they use at the present time. They have to get underneath the car and place that chain around the truck bolsters, through the transom of the cars, in order to be able to pull the train with the chain. They could not put the drawhead in. You have to get the drawhead out of the car, load it on the car if it is an empty car, and I want to say right here that there are no two men in this courtroom who can load one of these drawheads in a car. It requires not less than three men to do that, and it is necessary to have one man back protecting the rear at all times. The conductor has to hand in his daily report when he arrives at the terminal point (p. 75).

That has to be made while he is operating the train from one point to another. If his report is not ready to turn in to the trainmaster when he gets there, he is

disciplined for it. The conductor's time is usually taken up all the time. He makes out this report when he is running between stations. If there is a break in the train his duties require him to attend to that at once. That's an emergency. It is his duty to see that the train is protected and get his train together, either chained up or coupled up, and proceed. He sends a flag back to protect his rear. Sometimes it is necessary to protect from the other direction, and, in that case, one brakeman would be flagging in the rear and one in front. On the Iron Mountain that would leave the conductor and one brakeman to fix up the breakage. When they have two brakemen it would leave the conductor, and he couldn't do it.

Under the old system the report was made by the conductor any time after they got in. He could devote more of his time looking after the various parts of the train than he can now (p. 76).

The safe operation of freight trains is increased by a careful examination of the journals and boxes at the various stops. With two brakemen it is impossible to make careful examination where you have to flag at stops. It usually takes one man on each side to inspect. They find a great many times the brake beam is down and dragging, which if allowed to continue might cause a derailment. The rules provide always that they must inspect the boxes for hot boxes, and keep close watch. To do that you go along and put your hands on them,

and see if they are warm. There are eight boxes on each car. On some divisions they handle fifty to sixty cars. If the crew finds a hot box they are required to carry water to cool it off and repack it if necessary, or put in a new brass. If a new brass is required they have to carry a block about four feet long and about 6 x 6, and a car jack, lever, oil bucket, a brass and water can from the caboose to the car that has the hot box, then jack up the car and take the brass out, put in a new one and repack it, after having cooled it off with water. That has to be done by the train crew.

Under the old system the largest cars we had were 40,000, and at the present time they are 100,000. The average capacity of the cars have doubled. The equipment for raising a car to put in a new brass is just the same as we had those days. Two men, if they are unusually good stout men, could jack up one of those hundred thousand pound cars. If they were not strong men it would take three men to do it. A hot box is a very common occurrence in the operation of freight trains (p. 77). If a hot box occurs, with the present equipment, it is necessary to have three men to protect the train and replace the brass, to the best advantage, in the operation of that train and the safety of the public. You have one man flagging, and in 90 per cent of the cars you jack up, the wheel raises when you jack the box up, and you have to get a pole and get two men to bear down on that wheel, in order to get the old

brass out and the new one in. To do that, it is necessary to have three brakemen or call on the engineer and fireman to help you. That cripples the equipment at the engine. For the best operation of freight trains, the engineer should sit in the engine on the right-hand side and the fireman on the left.

The crew is relieved by the presence of air brakes from the actual stopping of the train and holding them down grade, except in cases of emergency, but their other duties have increased, so that the work they now have to perform is greater. If they had the link and pin system now operating trains of from forty to fifty cars, or even sixty, without air brakes, it would require about six brakemen.

If, in the operation of a freight train as conductor, I found a mishap on the road, it would be my duty to leave a flagman to protect it. That frequently occurs, and if he only had two brakemen, that would leave only one brakeman and the conductor on the train.

It is not safe at the present time, with the number of cars and tonnage we have, to operate trains with only a brakeman and conductor.

On a long train it is almost impossible to convey signals from certain points of the line from the rear end to the head end with two men. That is on account of curvature of the road and different conditions. You can't see a signal in some fogs hardly any distance at all. We have very heavy fogs at times. In case of

fogs the men are placed along the train in order to convey signals from one end to the other.

They have less car inspectors on the lines today than they had before. It was the duty of the car inspector, when stationed at intermediate points, to inspect trains stopping there, and repair hot boxes and any breakage that might be on the train. If the inspector is not at these intermediate points, the conductor is responsible for this work, and the brakemen have to do it. Two brakemen cannot do it and perform their other duties.

It is the conductor's duty at telegraph stations to go to the telegraph office and receive orders. He has to leave his train to do that. When he gets his orders he delivers them to the engineer and the engineer reads them aloud to him. The engineer is then required to read them to the fireman, and the conductor reads them to the brakemen. That is done so that they might understand the movements to be made by the train, and if one man overlooks a meeting point to be made by the train, or a passing point, one of the others would call his attention to it. It is safer for three brakemen to understand these orders than two, because the larger number you have who have that knowledge the less chance there is for them to forget it (p. 81).

There was an order issued by the Missouri Pacific, and it is a rule today, that the third brakeman shall ride

in the middle of the train for the safe operation of the train.

"A. The protest that was made was made in this manner: That in extreme cold weather, bad weather, where trains were ascending grades, the men objected to riding out there, because they were absolutely useless at the time, if they rode out there the entire distance over the division. They could not dress sufficiently warm and be any good if they would be required to do any work. They objected to riding up the hills in the middle of the train, and they wanted the privilege of going back and getting warm. That was the protest."

The order that they were about to promulgate required the third man to stay all the time in the middle of the train. That was to extend all over the system. It would conduce to the safety of the train, if the third man should stay in the middle of the train, if it was physically possible for him to do so.

"Q. It has also been said here that the Missouri Pacific was going to take off the third brakeman, and that they were restrained from doing that for fear of a strike or some trouble with their men. What was there to that? I mean your dealings with the railroad officials and matters of your own knowledge?

"A. I would be glad to give you my own explanation of it as I happened to be in the conference that handled that matter. There was an order issued to take off a certain number of the brakemen between Kansas City and Little Rock on the Fort Smith road. The brakemen and conductors immediately protested against that being done on account of the safety of the crew and the additional labor they had to do. Mr. Anderson and myself were called to Coffeyville and we took that matter up with the general superintendent at that point. From there we went to St. Louis and took the matter up with Mr. Higgins, assistant general man-

ager, and from him to Mr. Sullivan. We took that up with seventy-odd other cases we had pending at that time. It was handled in the regular way, but there was never any question about a strike. There were never any threats made after we, as a committee, had gone as far as we could go, which was to Mr. Sullivan, and he declined to replace the brakemen. The grand officer of the organization was called in to refer the matter to Mr. C. S. Clark, vice president, who was at that time in Europe. Mr. Sullivan agreed that pending Mr. Clark's return and a final adjustment of the case there would be no more brakemen taken off, and that in making up crews the same number of men would be put on the crews that obtained at that point. The matter is still pending. It has never gone any further. The vice president never has made an appointment to consider the case, either with the committee or with the grand officers, but there was no talk of a strike; it wasn't threatened and it was unthought of. It has not gotten to that point at all."

They then claimed that they would take the third brakeman off of all fast trains; they had no intention of taking them off the drags. They conceded that three brakemen were necessary on through freights, except "red ball" trains.

If the air pump gives out it leaves the train absolutely powerless, so far as the air brakes is concerned, and then it must be handled by the hand brakes. In my experience, the air brake does give out, and they deliver the train at the terminals in the old way with hand brakes. It does not make any difference where the terminal is. I say that in some cases. There might be other cases where they do send men out to repair it (p. 83).

I had a case not more than thirty days ago between Coffeyville and Van Buren, where a man had fifty-five cars. He had an air brake failure and reported the matter to the trainmaster, and was instructed to proceed with the train and handle it with hand brakes to the terminal. I will say from my experience that a train could not be handled safely with two brakemen and the conductor. My opinion and experience is that the presence of a third brakeman insures the more speedy handling of freight, the more ready delivery of it, and the better serving of the public generally than could be done with two brakemen in the operation of these freight trains. Through freight trains have to do switching (p. 83).

"A. Under the new plan of operation, they operate by the tonnage system. The difference in the grade lines on different parts of the road require that the crews set out and fill out at different points along their divisions, according to what the grade line may be in front of them. The engine might be rated from here to Bald Knob at one thousand tons and from Bald Knob to Newport at fifteen hundred tons. In that case the crew is required to fill out at Bald Knob from one thousand to fifteen hundred. They may have to reduce that train at Newport to one thousand again. That is done in order at all times to have the full tonnage of the train on the engine as she is."

The hand brakes of today are not kept up like they were under the old system. That is, the rigging is not kept up, not looked after as closely as it was in the days when the brakeman handled them, because at that time each brakeman that handled a train went over his

brakes and repaired each and every one, so that he had them in good condition at all times. Now they don't do it. I should say now that when the emergency arises to control the train by hand brakes it would require more brakemen to handle the train.

The crew are supposed to make an inspection of journals and boxes at every water tank and every time they stop. The brakemen and conductor must examine the train, and there is no time given. With the present duties imposed upon the conductor, he has not a great deal of time to do it. If there are any orders to be gotten, he has to go to the office, and the brakemen examine the train. The smell of a hot box is a later consideration. After the box has gotten hot and has smoking oil in it, or enough to smoke, you may be able to smell it while running. In an ordinary inspection they cannot rely upon the smell. They feel of the box as they go by, laying their hands on it to see if it is hot. The breaking of a journal generally results in a wreck (p. 85).

If the train breaks in two, it stops immediately. It is almost like a collision. Frequently we have men injured in the caboose by the breaking in two or bursting of the air hose. It happens very often that one man of the crew is so injured that he cannot help in difficulties. The presence of a third brakeman in these instances would add to the efficiency of the operation of the train, and the safety of the crew.

The automatic coupler does not altogether eliminate the necessity of a man going between cars to do coupling. As long as the coupler is in good working condition, and there are no defects, it will couple all right, but brakemen must go between the cars to couple the air hose. The presence of a brakeman at that particular point to couple is just as necessary as it ever was. With the best system of automatic coupler in the ordinary operation of trains, the men have to actually manipulate the coupler in order to make the coupling. They often have to hold the pin. It is the duty of the brakeman, whenever they are going to pick up cars, to cut off the engine and get inside the track and couple up whatever cars they are going to pick up. His presence is necessary there every time the engine is coupled or uncoupled. It is necessary at any place where they pick up or set out cars or cut a crossing. Through freights do switching at places like Jacksonville, Walnut Ridge, Corning, and places where they have public crossings. In those places, the safety of the public can be better served by having a third man, or three brakemen instead of two (p. 86).

If you have been stopped on the main line it is a protection to the crew and public to have the freight train move out as rapidly and quickly as possible.

We have in our supplies fusees and torpedoes. A fusee is supposed to burn ten minutes. When a man out flagging three-quarters of a mile, or such matter, is

called in, if at night, he immediately lights one of these fusees. By the time you get in to the train and you pull out, you want to get away as quickly as possible, on account of the fact that fusees may burn out and not protect you.

Three brakemen would be an advantage at curves, because you have your men stationed so that they can get your signals to the engineer directly. The same would apply in a fog.

CROSS-EXAMINATION.

I am not now in the employ of the Missouri Pacific. I am in the employ of the Order of Railway Conductors. I last worked for the Missouri Pacific as passenger conductor two years. I have been out of the service six years. I was extra passenger man the last two years I was in the service. No other road in the Southwestern country has three brakemen, except the Iron Mountain, that I know of (p. 89).

I canot say how the other roads manage to get along with two brakemen. I don't know anything about it. I don't know how freight trains manage to operate with two brakemen. I have not been in contact with them. Under the old system a brakeman was a brakeman, and did braking. Now he performs the duties of brakeman whenever it is necessary to set brakes. In running a train, he does not always per-

form the duties which he originally performed, and from whence he got his name.

"Q. For instance, you say that under the old order of things with the present tonnage, it would take six brakemen?

"A. It would not be as safe with six under the present tonnage as with three under the old tonnage.

"Q. Then the modern appliances have reduced by one-half the number of men to run the trains under equal conditions?

"A. It seems to have done that."

The conductor's duties have increased in the making out of reports at least 50 per cent. He makes a more complicated report. He has to reduce his tonnage to pounds, and shows many things on the report that he didn't show in the olden times.

A through freight train is one that does not do local work, loading and unloading merchandise, and is carded as a through freight train, from one division point to another. There are no cars to be set out here and there for the local trade. That train is not always made up at the yards and terminal points. They may have to fill out at some places. To do that the ordinary train is made up by the yard crew and delivered to the conductor and his crew ready to go out (p. 90).

It is the practice at large terminal points, such as Argenta, to have the train thoroughly inspected before it is turned over to the crew. We have many division

points smaller, and there is not an inspector at all division points. I do not think I can name a division point in Arkansas on the Iron Mountain Railroad where there is not an inspection (p. 91).

If there were any hot boxes or defects on the equipment and there is a careful inspection before it is turned out, they would probably find it, but very frequently the yard crew in switching these cars cause defects in the cars that will not be seen by the inspector. The inspector reduces the probability of accident just the same as a third brakeman, or the brakeman's examination on the road, but the brakemen have to inspect that train at every stop just as much as if there had not been any inspection at all. If there is any sign or evidence of any heating about the boxes, they lay their hands on it. They do not lay their hands on every box (p. 92).

It would be an impossibility to go along and feel every box. They never feel all the boxes on the train (p. 92).

The man who inspects a certain part of the train will probably feel the boxes of that part of it that he inspects. It is very frequently the case that a train is not all inspected. The stop is not long enough to give the men time to inspect the train. They can tell, of course, by seeing if the box is smoking or other indications. If it is, or has been hot some previous time, it will show evidences of it (p. 93).

A through train does switching. Very often a through freight train will start out with a train of empties and have instructions to peddle them out from one end of the division to the other. I call that a through train (p. 94).

It takes one man to make one coupling. Couplings are made one after another.

"Q. When you do this coupling, you take a cut of cars out of the train and set it in on some side track?

"A. Yes.

"Q. Do you need any more than one brakeman to do that?

"A. Yes.

"Q. Why? What does he have to do?

"A. One brakeman has to open the switch.

"Q. Can't the same brakeman do that?

"A. He can. He could do that.

"Q. You can't go in on that side track until it is opened?

"A. No.

"Q. There would not be any need for any other man to do that. Don't you know, as a matter of fact, that he does do it?

"A. Yes. When he goes to set out a car, if it is near the engine that's what he does.

"Q. The brakeman that follows that cut of cars is the man who opens the switch?

"A. Yes.

"Q. Then, he rides that car down to the coupling?

"A. Yes.

"Q. Then makes the coupling?

"A. Yes."

The law requires that cars with these automatic couplers should couple as they go together. There are a great many places where one man can be on the rear of a string of cars and see the engineer in order to get the proper signals. The conductor would be attending to whatever duties were required at that time and place, possibly getting orders. The orders are not always ready. The conductor goes in and signs his orders whenever they are ready for him. Usually whenever they are switching the conductor will be out looking after the work. When the board is turned it is his first duty to ascertain what that red board is for. It is possible that he may have to protect himself in some way by a flag. A train order is an order issued by an official in charge, the train dispatcher, which supersedes the rules. It is for the movements of that train. The first thing the conductor does is to go get his orders, and if he was down there twenty-five or thirty minutes he would go on, unless he had further orders not to. If he was going to have a twenty-five or

thirty minute delay there, when he went and got his orders, he would say to the ditpatcher, "I am going to be delayed here twenty-five or thirty minutes doing work." He would go back if the board was to show red again. An order is good until it is recalled. After you deliver your waybills and get your orders, or get your waybills, it is your duty to get the number of the cars you are picking up, and the seals. Then you can help the flagman. Different States have different laws about crossings. At most places they must be cut if you are detained five minutes. The instance I spoke of a while ago of the air giving out was eighty-five miles from the terminal. That was between Van Buren and Coffeyville.

I know what the rules of the Interstate Commerce Commission are, and I know what the company does. It has been the practice on the Missouri Pacific to do that. I have had notice of three different cases. In that case the Missouri Pacific has violated the Interstate Commerce law. If the Interstate Commerce laws are obeyed they could not do that (p. 97). The rule is for the conductor to report and get instructions. I do not know anything about the committee that appeared before the legislative committee when this bill was pending. I do know the gentlemen, Walsh and Jackson, but I don't know anything about them appearing before the legislature. I don't know anything about a statement that was made before the committee,

at that time, that the committee had stated to the road that if they took off one brakeman, the order would take off the other two (p. 97).

We make our reports out between stations. A through train omits as many stops as it can. Between stops the conductor has nothing to do except make out his report and watch the running of the train. With two brakemen, we have five men to watch the running of the train, including the engineer and fireman. Their duties are at the head end. The making out of the report does not add anything to the work of the brakemen. The brakemen usually watch the running of the train when the conductor is making out his report. The conductor and rear brakeman, as a rule, watch both sides of the train for hot boxes, and where a car breaks down or anything of that kind occurs, or something dragging under the train stirring dust, they give orders to stop (p. 99).

I never weighed one of these chains. I have undertaken to help put one on a car, and I know it was as much as two men could carry. In chaining up a car with these big chains they now use, when they back up against the train with the chain coupled into the drawhead at front, it usually takes two men to get that chain up over the transom to the man behind to drag it through. One man must get in there between the truck and the axle and hold that chain up and pass it through. I have chained up cars alone. We used to

put the chain around and hook up over the truss rod. We didn't have to get under the car. These chains are carried in the caboose. There is one on the engine, but it is kept there for the engine chain. If a drawbar belongs to a loaded car it is thrown out and picked up by the section men, but if it belongs to an empty car, the instructions are to put it in the car where you can. You are not protected on the St. Louis, Iron Mountain and Southern Railway, at coal chutes and at yards by flags. You have a yard limit board, but that doesn't protect you. You must flag your rear end when stopping. The yard board requires you to reduce speed, but if you are inside the yard limit board, and get hit by a train following, you will be censured for it.

A torpedo is a small cap placed on the rail to attract the attention of the engineer. It doesn't burn out. The train immediately stops when they strike a torpedo, but when they don't see anything of a fusee or a red light, they would proceed on their way. The rules require them to proceed a certain extent and look out. A torpedo is not a full protection. It is only a partial protection, but if they were set out up to the point where the advancing train would come in sight of the rear end, and the engineer of the train obeyed orders, he would not run into the train. As I understood the question of the prosecuting attorney, when I said if one man was injured it would leave two, I understood it was to apply to a case where the conductor

was on the head end and approaching a meeting point or station, and there was but one man on the rear end of the train. If they broke in two, and anything happened to the man back there, the conductor does not know whether he has any protection or not. That is simply an emergency, an accident that is likely to happen. I suppose the rule to leave a man at a burned bridge or broken rail applies to all railroads. After you had left all your men flagging, you could run to the next siding or telegraph station and tie up (p. 103).

REDIRECT EXAMINATION.

Under the present system, we have more drawheads to pull out than under the old system. It is on account of the increased power of the engine. The equipment of the cars has not kept up with the increased power. Under the old link and pin system, the link or pin would break, as a rule, or the drawhead would pull out. There is 50 per cent more repairing for the crew now than there was under the old link and pin system.

It would be safer if the crew should examine all of the running gear of the car at every stop. Of course, three men can come nearer doing that than two. Any duties that are put on the conductor keep him from doing things that the brakemen have to do (p. 104).

W. E. PEARSALL testified (p. 104) in substance as follows:

I reside at Argenta and am freight conductor. Have served in that capacity on the Iron Mountain about seven years. Before that I broke about six years on the Iron Mountain and three years on the Louisville and Nashville. I have served on the Iron Mountain between Van Buren and Argenta. Served as freight conductor on both local and through freight. The majority of my work as conductor has been on through freight trains. I have had three brakemen on all trains except one trip. I think possibly I ran what they call a "red ball" train through with two brakemen. I think three brakemen are more safe in the operation of freight trains, both to the employees and to the public. We have peculiar conditions in this country that don't prevail in other localities. We seldom ever have what is known as a straight through train. We have a great deal of switching to do. We have coal mines in the district I am working on, and in other districts they have sawmills. There is more or less taking up of cars and setting out of empties, etc., at these points. Consequently, in my opinion, it makes it more essential for a third brakeman (p. 105).

For the last year or two, especially, there has been a large volume of business moving through this country, and we have a lot of trains on the road. If you take a siding where there is a curve and there are two or three trains there, signals have to be transmitted to saw the trains out. There have been accidents, too,

even under those conditions, but they are very few. I have seen the time when I have used six of them (p. 105).

"We will take Plumerville; that's a curve; going both ways; a very bad place coming this way. If I was back there a mile or a mile and a half, I am the third man. We have got to meet a passenger train up there, but there may be one due from the other way; I know there is a saw there; my duty is to first see whether or not my flagman goes out to protect me from the train going north, we will call it. When I have done that, and know my train is protected, my next move, if I am a practical conductor, is to go there to the head end and find out what the movement is going to be there, or coöperate with the other conductors and have an understanding as to how we are going to get these trains away. That's your duty. The result is we may be made to go around curves, and you can't see from the obstruction of seedhouses and trees. We need that brakeman very badly to transmit signals. I might have sixty-five cars, like I have often. In that case it is guesswork unless you have somebody to transmit the signals" (p. 106).

A saw is where the sidetrack will not hold the trains, and the train has to back out to let a passenger train out.

When I get into a station where orders are to be received and cars picked up or set out, my duty is to go over and superintend the setting out of those cars. After I get a thirty-one order, my duty, after signing for it, is to deliver it to the engineer in person; then, of course, I will have to get my cars or assist in setting out cars.

If a train is following close the rear brakeman has to protect the train, and the swing man in a case of that kind, inspects the train or cuts the crossing, as the case may be, if you pull up and stop. In my experience as freight conductor I have found daily necessity in the operation of trains for three brakemen.

"An old, experienced man on the Missouri Pacific or Iron Mountain, brakeman or conductor, who is accustomed to the cars and to work, is very careful the first three or four stops he makes to feel those boxes, to catch them in time to prevent them from getting too far gone. We have numerous boxes that you might walk by and never detect them, that is getting hot; that is, I mean to be seen. I have known new swing men walk right along and and look at the cars and never put their hands upon it. I said, 'Here, if you want to find a hot box you have to put your hand upon it.' He said, 'Why?' I said, 'You will find out.' Some boxes have got enough oil to produce a smoke, but some have not. The best way to do, and the safest way, is to feel of them. The majority, I think of the old brakemen make a practice of absolutely putting their naked hand on these boxes. That is, I don't say they do that every time they stop, but as a usual thing, starting out, take three of four different stops; take from here, for instance, there is a tank at Palarm, one at Gleason and one at Germantown. When you get up as far as Germantown or Russellville, coming south, and you have not discovered a hot box, as a matter of fact you are satisfied that your train is in very good condition; you might not be so careful to feel of every box after that."

If a hot box is not attended to you will likely burn off a journal and wreck the train. The inspection by putting the hands on the boxes is necessary to discover a hot box. Two brakemen could stay a longer time

and inspect the train. In the time given them to do it they couldn't. It is better to have three men. If a brass is found defective they jack up the car, take the old brass out and put a new brass in. With the average car now operated it takes two men to put in a new brass.

If a drawhead pulls out the men have to chain the cars. They put the chain on in the daytime with two men; at night three is necessary. It would take the conductor and two brakemen to chain it up, and the other brakeman would have to be back flagging the train (p. 119).

My experience is that three men are needed daily to transmit signals safely. There are various conditions arising under which they could be used, or absolutely needed. For instance, I had a "red ball," or delayed car, to pick up; I would have forty or fifty cars on my train, and have to pick that car up next the caboose. It might be a bad place, and while doing that I would have to protect my train by sending a flag out. The necessity of a third brakeman is increased by foggy conditions (p. 109).

Passing tracks are sometimes occupied by cars. The traffic hauled over the road for the past five years has increased about thirty-five or forty per cent.

"In the mechanical department, I believe six or eight years ago we had one master mechanic; today we have two. Six or ten years ago, in the district I am working in, we had a superintendent, who had jurisdic-

tion from Coffeyville, Kansas, to Alexandria, Louisiana. We had one trainmaster, who had jurisdiction from Little Rock to Coffeyville, Kansas. Today we have a superintendent with jurisdiction from Little Rock to Coffeyville. We have a trainmaster with jurisdiction from Little Rock to Van Buren. We have a trainmaster with jurisdiction from Van Buren to Coffeyville,

"Q. You are referring now to the Iron Mountain system?

"A. Yes. Now, of course, this territory south of here has been divided into divisions or districts. We have a superintendent with jurisdiction which reaches from here to McGehee, as well as I remember. Then I think we have got a superintendent from possibly McGehee to Alexandria; that is a different district. Just how many trainmasters there are in that locality I could not tell you" (p. 110).

These drawheads often pull out where it is necessary to carry the chain across ditches and fences; sometimes across trestles.

CROSS-EXAMINATION.

I worked as brakeman on the Louisville and Nashville Railroad, on a local freight. I never operated as conductor on that road. I had three brakemen at all times, and four on locals. I have had an opportunity to make comparisons with other railroads by conversing with other men over the country.

The Central Division of the Iron Mountain has not done as much business in grain shipments from the West that are consigned to Little Rock and Southern

points as it used to. Prior to that time it did a great deal. A great number of them were through trains, and a great many of them had short loads. We do not have any through shipments of coal north. We have some from Denning to Little Rock and some from Spadra (p. 112). There are mighty few trains that don't do some switching at some time. A "red ball" train is a high-class freight train. That is a through freight train. We have handled what we consider "red ball" trains and "red ball" short loads in them. We switched them out. I don't know about the character of the trains from Texarkana north from personal knowledge. I think a limited number of trains, made up of California fruit, Texas fresh meat and refrigerator cars, don't stop anywhere, except at water tanks and for passing trains (p.113). They sometimes take a nineteen order without stopping. I can't say to what extent such trains run. I could not say that brakemen on such trains would have as much to do as they would on a train switching. There is plenty of business there to keep them busy. This train would bear very close inspection. The only opportunity of inspection would be when the train stopped for water or coal or to pass some other train. If it was a through freight, with periodical stops, I suppose they would not have much to do (p. 114).

Since the improvement in the appliances there has been a reduction in the grades over some portions of

the roads. Still there are grades there yet. The heaviest grades have been taken out of the road within the last five years, and a great deal of money was spent in rebuilding that road.

Often drawbars are pulled out by poor management in handling the air, or an inexperienced engineer handling the air. There is no specified place that a drawbar will pull out. We have had as many drawbars pull out on the head end as we have on the rear end (p. 115). Sometimes they pull out in places where it is absolutely impossible to load one of them, and they are thrown to one side, and the section men bring them in. There is seldom a trip made that one drawbar does not pull out, and I have had as many as three or four in one trip to pull out. I make, possibly, eighteen to twenty trips a month. I think the Central Division would average 200 drawbars per month pulling out between Van Buren and Little Rock. They would be brought to either Baring Cross or Van Buren. In some instances it would take two men to chain up a car, and in some three. There are different kinds of cars. At night you need some one to hold a light. A man cannot handle the car chain and light at the same time.

I report to the telegraph office as soon as I get into a station. There are conditions in practical railroading where you go back to the office. After receiving orders it is my business to go on with the train if I can proceed, but when I get orders and go to my engine

or train and something intervenes there that I cannot get out, I go back and get another order—owing to how long the intervention would be. If I had an order at Palarm that I would meet a train at Russellville I would call it very silly in me to go back to that office to find out about orders. If I stopped for water, and nothing else, I would not go to the telegraph office, unless I had business. If I had something to call me from the train I would look out as I went along. In some instances there would be nothing to prevent me from inspecting the train. The conductor does not inspect as regularly as the brakemen. I endeavor to observe the rule that conductors must examine their trains whenever they have an opportunity to do so, particularly when entering or leaving sidings or waiting for other trains.

REDIRECT EXAMINATION.

First-class trains are superior to second-class trains, and second-class trains are superior to third-class trains in operation. Extra trains are inferior to other classes. On the railroad I am working for I haven't seen a card train, outside of a local and passenger, until right recently—for, I think, possibly forty-five or sixty days. They are running them all extra, except locals and passengers. Trains in the direction specified in the time table are superior to all trains running in the opposite direction (p. 120).

We used to have a car inspector at a place called Coal Hill, and he helped inspect our trains and assisted in packing hot boxes. He was to inspect the cars that came out of the mines there, but the last few years that coal mining district has changed to a place near Denning, and this inspector at Denning does not inspect any trains passing through Denning.

With the automatic coupler the presence of a brakeman at each coupling is necessary, to see that the coupling is made properly and couple the air hose. The hand brakes don't receive, in my jurisdiction, the attention they did receive prior to the adoption of the automatic air brakes. There are times that I do not ride from here to Van Buren, sixty miles, in the caboose. I act about the same as ordinary conductors act in that position. The brakemen couple up the air hose a good deal on freight trains (p. 121).

RECROSS EXAMINATION.

I would say that under ordinary circumstances the brakemen couple up all the air hose. I am not acquainted with the fact that that is not the rule on the Rock Island.

"For the purpose of expediting the matter it was here agreed by and between counsel for the State and for the defendant that R. Kramer, F. M. Schultz, W. W. Dunn, R. R. Cook and E. E. Horner, all of whom are now in active service as freight conductors on the Chicago, Rock Island and Pacific Railway Company in Arkansas, the defendant in this case, would, if placed

upon the stand, testify to the same state of facts as have been testified, and express the same opinion as expressed by W. C. Turner and W. E. Pearsall, whose testimony is hereinbefore set forth, except that they would testify that on the Rock Island road they have been operating with two brakemen instead of three.

"And it is further agreed that C. H. Terrill, W. G. Walsh, J. M. Mitchell and G. W. Anderson, who are now, and have been, in the active service of the St. Louis, Iron Mountain and Southern Railway Company as freight conductors, would, if placed upon the stand, testify to the same state of facts as have been testified to, and express the same opinions as have been expressed by W. C. Turner and W. E. Pearsall, whose testimony is hereinbefore set forth.

"And it was further agreed that B. W. Holbrook, who is now in the service, and has been in the service, as freight brakeman, on the Chicago, Rock Island and Pacific railway, would testify to the same state of facts as was testified to, and express the same opinions as were expressed by W. C. Turner and W. E. Pearsall, whose testimony is hereinbefore set forth, except that he would state that in the operation of the Rock Island freight trains and through trains only two brakemen have been employed" (p. 220).

DEFENDANT'S REBUTTAL.

W. T. TYLER, being recalled, testified (p. 123), in substance, as follows:

"Q. What has been your observation as to the increase or decrease in the number of cars in freight trains generally since the adoption of the air brakes and automatic couplers, as compared with the time before their adoption?

"A. As a general rule there has not been an increase on roads that I have been connected with, and that is quite a number. I arrived at that conclusion

from the fact that the average number of cars hauled for a freight train mile is one of the important and vital statistics of railroad operation, and it is included in the annual report of each and every railroad. Prior to about 1890 it was really the operating statistics, the statistics upon which was based the question of the efficiency of the operation of a division. After that time the ten-mile basis was reached, but even now each annual report and each monthly operating statement includes those figures, and they are about the same now as they were ten or fifteen years ago. The increase in tonnage per train, due to the larger engines, has been provided for, or caused by the increased capacity of the cars, both the large capacity of the cars and the large capacity of the engine being made necessary by the growth of traffic. But the average number of cars per train has not materially increased, if it has, in fact, increased, the average number of cars per train mile on railroads throughout the West, those I have been connected with and those I have seen reports of.

"Q. The method of inspection on the different roads have been testified to. What is your observation, and what is the fact on the railroads generally in Arkansas, with reference to the inspection of trains now, as compared with former times?

"A. The inspection made at terminals by regularly employed car inspectors is very much more rigid than it formerly was. There are more inspectors employed at terminals. That is made necessary by the safety appliance law and the orders of the Interstate Commerce Commission. It is necessary now that cars be very much more closely inspected than they were formerly, to avoid having to go out in trains with the safety appliance defective. I think, perhaps, the force of car inspectors has been more than doubled, I should say, in the terminals within the State of Arkansas, with which I am familiar.

"Q. It has been testified that conditions in reference to switching are different in Arkansas than in other States surrounding Arkansas. You testified, in

chief, that you had been employed on various roads in Missouri, Arkansas, Oklahoma, Texas and Louisiana, I believe. Now, what are the conditions in reference to switching on through trains in Arkansas, as compared to those territories?

"A. I should say that there is less local business in Arkansas than in the other States named. Some parts of the Iron Mountain road in the extreme southern part of Arkansas have quite a number of sawmills where the local loading amounts to considerable. The work at those mills is done by local trains, ordinarily, and where one local train does not accomplish it a switch train is usually run. And that is true on the Frisco line, with which I am connected. The local loading at the mills is taken care of to a very great extent by the local trains, while in the mining districts there is usually switch engines employed. We have quite a number of mines in Arkansas, and in all those points we employ switch engines. They pull the loads out of the mines and place the empties; they concentrate the loads at one station; a train of empties is run out from the terminal to that station, the empty cars are set out and these loads picked up into solid trains. The other States you named, as, for instance, Oklahoma, is an agricultural State. A great many of the towns have elevators, and I should say that the average local loading at the local stations is very much heavier in those States than it is in Arkansas. There are vast stretches of track in Arkansas where there is practically no local loading at all. We have considerable of it. We have districts of 125 miles where the local loading will not amount to twenty five cars per day on that entire 125 miles of railroad. It is very seldom you find that condition in other States, because of the agricultural products and the grain that comes out of the elevators.

"Q. You have heard the discussion in reference to the necessities arising for the use of a third brakeman on the Iron Mountain road. Will you state your experience and observation on the Iron Mountain road and on the other roads with which you have been connected in the State of Arkansas and these other places,

in reference to the happening of accidents, as between the Iron Mountain road, which uses three brakemen, and the other roads, which use but two brakemen?

"A. I was connected with the Iron Mountain for about five years, during all of which time three brakemen were used on through freight trains. Since then I have been connected with the Frisco, where two brakemen are used, and I never saw any difference in the matter of the safe handling of through trains, in the matter of accidents to freight trains or delay to freight trains. Our operation of the Frisco road with two brakemen is, in fact, better today than the operation was on the Iron Mountain during the time I was with it, with three brakemen. I will say that candidly. And my experience has been the same on other roads before I came to the Iron Mountain. I never worked for a road, as I stated before, that had three brakemen, and I never knew of an accident occurring that might have been prevented had there been three brakemen on the train, so far as I can remember. My observation has been that the operation of a train with two brakemen is fully as safe as with three, and I think it is borne out. I base my statement not only on my own experience, but on the reports of those roads.

"Q. How do your trainmen inspect cars, or inspect their trains?

"A. Our rules on the matter of train inspection are substantially the same as other roads. We require the conductor to inspect his train when he can do so, and we expect him to make that inspection; we prefer that he make it when pulling in and out of sidetracks. We regard it as the best method of inspection, because he has a better opportunity to observe anything wrong with the running gear of the train when in motion than he has with the train standing still. We also expect the brakemen, and the conductor for that matter, to walk by the train when it is standing on the sidetrack, waiting to meet trains. The rule only requires that the trainmen do that whenever they have an opportunity to do it. It does not mean that they shall neglect

any other duty, neglect to flag, or neglect their work, for the purpose of inspecting the train. If they have any reason to believe that there is anythnig the matter with the running gear we expect them to stop and stand there, regardless of how long it may take, until they give it a careful examination. We have met cases of trainmen finding a broken flange in that way.

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I am familiar with the work of chaining up drawbars, and have engaged in that work. One man can chain up a car, and he can do it without any great length of time to do it in. It is done, ordinarily, by placing the level end of the chain in the coupler of the car that is coupled, backing it against the other car, passing the other end of the chain between the cut bolster and the transom around the center beam and back into a hook at the proper point in the chain (p. 125).

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the hand brakes. Now, my experience in braking covered something like about five years. I broke on the Great Northern road, where trains were controlled entirely by hand. I will say in those trains, not only the number of cars, but the tonnage of those trains, was greater than is hauled, ordinarily, in Arkansas, or on any road I know of. Our trains consisted of forty-five cars of wheat, and a car load of grain on our road at that time was from 40,000 to 60,000 capacity. They are loaded to the load limit, which is ten per cent above the capacity of the car. I have frequently seen 1,800 tons in a train, and two brakemen handled those trains, and we handled them safely. In that length of time as brakeman I never was in an accident. Another thing that occurs to me is, in those days we not only used one engine, but we used two. We used double-headers. If one engine would not haul forty-five cars of grain, two would. They are hauling approximately the same trains on that road today that they were then, and they are hauling them with about ninety per cent air brakes.

"Q. Those cars you were able to handle, then, successfully and safely with two brakemen, you being one of the brakemen?

"A. Yes.

"Q. Does your road require the drawheads to be brought in to the terminals by the trainmen?

"A. No. That rule is an obsolete rule. That rule came down from the time when we used the pin and link drawbar, and the attachment, then, was a spindle, the spindle going through the back end of the drawbar, and was placed behind the spring. The drawbar weighed about one hundred to one hundred and fifty pounds, I think, depending on the style of the drawbar, and it wasn't a very serious task to load that drawbar. In fact, it wasn't a very great task to put it back in the car, but since the adoption of the automatic coupler they are too heavy to handle, and, ordinarily, or at least very often, when they do pull out, they bring the draught timbers with them, and we don't require that

they be loaded. During the last two or three years, or during all the time I was with the Iron Mountain, they were not required to be loaded. We have them picked up by the section men and brought to the section man's headquarters at the roundhouse and loaded upon the scrap pile.

"Q. Are you familiar with the rules of the Rock Island and the Frisco in reference to whether or not they require the men to couple the air on leaving terminals?

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"Q. So, then, when the men take the train they are ready to go?

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The Central Division at that time had approximately a two per cent grade line, and the number of cars hauled ranged from fifteen to twenty. Since that time the grade has been reduced, and they haul about forty. The tonnage hauled over the old line, before the grade reduction, was about 900 tons, and the tonnage hauled over the Central Division when I left the Iron Mountain was, I think, 1,400 tons. The switch engines do not make up through trains at sawmills, but at coal mines our practice is to switch all the coal together, so that the outging train has only to back into it and pick it up. There will be some cases where it is necessary to set the air brakes of the car behind, but these are remote cases, which are due to sone one's oversight.

"Q. Do you think the brakemen can inspect the boxes by simply standing and watching the train as it pulls out of a siding?

"A. Yes. I think it is the proper way to inspect the boxes, and I will say, furthermore, that it is the only way I ever saw a box inspected, and I will say to you that I never inspected a box in my life by going along and putting my hands upon it. I never regarded is as necessary.

"Q. That is, at least, it wasn't your way of inspecting?

"A. No; and I never saw it done" (p. 128).

I think the general rules for the operation on the Frisco are about the same as on the Iron Mountain and Rock Island. They are very much the same on all roads

within the Southern district. When I was braking on the Great Northern we operated forty-five loaded cars as a train. They were then equipped with hand brakes.

"Q. You say you rarely got into an accident?

"A. I never had an accident while I was braking, That is, an accident due to——

"Q. (Interrupting). With the present system of air brakes, they often have accidents?

"A. Yes.

"Then, really, the adoption of the air brake system has not reduced the danger of accidents?

"A. The number of trains operated has had some influence on that, no doubt; running more trains, possibly running at a greater speed, coming into stations faster, the stopping of trains by handbrakes was possibly a little slower, but ordinarily no chances were taken about coming into stations whatever. We slowed down the train at the proper point, and kept it within control. I don't know that that is altogether an explanation of that fact, but it is a fact nevertheless, that we did not have as many train accidents ten years ago on railroads per mile run by freight trains as we do now.

"Q. Isn't it a fact that the statistics show that the number of accidents are increasing every year; I mean increasing in proportion to the amount of business handled. Don't these statistics show a rapid increase in the number killed and injured in accidents?

"A. As compared with the perfect handling, I am not so sure that's true. I don't know. I am not posted on that.

"Q. Is it not true that because of the greater number of trains being run and the greater speed at which they are run makes it necessary that greater caution

should be exercised in the operation of trains than formerly, when they ran fewer trains and ran slower?

"A. Greater facilities are furnished to accomplish that. The air brake is necessary, and would be necessary under the present conditions to the perfect handling of trains over some single-track lines."

"It was agreed by and between counsel for the State and the defense that W. M. Whitenton, W. J. McKee, J. M. Walsh, W. O'Brien, Mr. Sneddiker, J. W. Dean and A. E. Walker would, if placed upon the stand, testify to the same state of facts as have been testified, and express the same opinions as have been expressed by W. T. Tyler, in rebuttal, whose testimony is hereinbefore immediately set forth, with the exception that those of said witnesses who are employed on the St. Louis, Iron Mountain and Southern Railway Company would testify that they used three brakemen.

"It was further agreed that Mr. J. M. Walsh's statement in regard to the average number of drawheads that are pulled out a month on his (Central) division, that is, from Van Buren to Little Rock, the same as W. E. Pearsall's division, shall be incorporated in the record as testimony on behalf of the defense.

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J. M. WALSH:

The following statement was, by agreement, introduced as the evidence of J. M. Walsh (p. 14):

chief, that you had been employed on various roads in Missouri, Arkansas, Oklahoma, Texas and Louisiana, I believe. Now, what are the conditions in reference to switching on through trains in Arkansas, as compared to those territories?

"A. I should say that there is less local business in Arkansas than in the other States named. Some parts of the Iron Mountain road in the extreme southern part of Arkansas have quite a number of sawmills where the local loading amounts to considerable. The work at those mills is done by local trains, ordinarily, and where one local train does not accomplish it a switch train is usually run. And that is true on the Frisco line, with which I am connected. The local loading at the mills is taken care of to a very great extent by the local trains, while in the mining districts there is usually switch engines employed. We have quite a number of mines in Arkansas, and in all those points we employ switch engines. They pull the loads out of the mines and place the empties; they concentrate the loads at one station; a train of empties is run out from the terminal to that station, the empty cars are set out and these loads picked up into solid trains. The other States you named, as, for instance, Oklahoma, is an agricultural State. A great many of the towns have elevators, and I should say that the average local loading at the local stations is very much heavier in those States than it is in Arkansas. There are vast stretches of track in Arkansas where there is practically no local loading at all. We have considerable of it. We have districts of 125 miles where the local loading will not amount to twenty five cars per day on that entire 125 miles of railroad. It is very seldom you find that condition in other States, because of the agricultural products and the grain that comes out of the elevators.

"Q. You have heard the discussion in reference to the necessities arising for the use of a third brakeman on the Iron Mountain road. Will you state your experience and observation on the Iron Mountain road and on the other roads with which you have been connected in the State of Arkansas and these other places,

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J. M. WALSH:

The following statement was, by agreement, introduced as the evidence of J. M. Walsh (p. 14):

"Concerning the matter of drawbars pulled out, will state that I am superintendent of the division which includes the Little Rock and Fort Smith Railway from Van Buren to Little Rock, covered by the testimony of Conductor Pearsall. We have a regular scrap train that goes over the road at regular intervals, picking up all the materials from each station to which it is gathered. The section foremen pick up all the drawbars that are pulled out and take them to the stations, and from this we have a pretty good idea how many drawbars are pulled out each month. There are sixteen freight trains per day over this division, making 480 a month. This includes all classes of freight trains, both local and through. Our records show that at least ninety per cent of the drawbars pulled out are pulled out around the yards, either by local freight trains switching or by the switching crews. One hundred drawbars a month would cover all the drawbars pulled out, and of these, as said before, not over ten per cent are pulled out by through freight trains."

It was agreed between counsel that certain rules of the Chicago, Rock Island and Pacific Railway Company and the St. Louis and San Francisco Railway Company should be introduced in evidence. These rules are copied in the transcript, from pages 130 to 141, inclusive. We do not deem it necessary, for the purposes of this appeal to copy the rules into this abstract.

IN THE

Supreme Court of the United States

(No. 226)

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE

The State of Arkansas filed two suits against the plaintiff in error. Said suits were based upon an alleged violation of Act No. 116, Acts of 1907, of the General Assembly of the State of Arkansas. Act No. 116 is entitled "An Act to Prescribe the Minimum Number of Employees to be used in the Operation of Freight Trains in this State, and Providing a Penalty for the Violation of this Act."

Said Act reads as follows:

"Section 1. No railroad company or officer of court owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

"Sec. 2. This Act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight trains so operated shall consist of less than twenty-five cars, it being the purpose of this Act to require all railroads in this State whose line or lines are over fifty miles in length engaged in hauling a freight train consisting of twenty-five cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, and three brakemen, but nothing in this Act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this Act.

"Sec. 3. Any railroad company or officer of court violating any of the provisions of this Act shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and each freight train so illegally run, shall constitute a separate offense. Provided, the penalties of this Act shall not apply during strikes of men in train service of lines involved.

"Sec. 4. All laws and parts of laws in conflict herewith are repealed, and this Act shall take effect and be in force thirty days after its passage."

The plaintiff in error filed its answers in said suits, in which it alleged that Act No. 116 (hereinafter called the "Full Crew Act") was contrary to the Constitution of the United States.

Said answers, omitting the formal parts, were as follows:

I.

"For answer defendant says:

"It admits that it is a corporation engaged in the railroad business, and in the transportation of freight over railroad lines in the State of Arkansas.

"It admits that on the fifth day of May, 1907, it operated and ran a freight train, containing more than twenty-five cars in Pulaski county, without having equipped the same with as many as three brakemen. It admits that said train was freight train No. 42, engine No. 1826, and that said train was operated in an easterly direction from Argenta, Arkansas, to Hopefield, Arkansas, and over a railroad of more than fifty miles in length, but defendant states that said train was engaged in carrying interstate commerce, and was, in fact, being operated from the city of Argenta, in the State of Arkansas, to the city of Memphis, in the State of Tennessee; that Hopefield is an intermediate station between Argenta and Memphis, and it was therefore necessary for said train to pass through Hopefield on its journey from Argenta to Memphis, as aforesaid

"It denies that the operation of said train, in the manner aforesaid, without having equipped said train with as many as three brakemen, was in violation of law; and denies that by so operating said train it became indebted to the State of Arkansas in the sum of $500.00 or in any other sum.

II.

"And for further defense, defendant states:

"That the Act of Arkansas, No. 116, entitled, 'An Act to prescribe the minimum number of employees to be used in the operation of freight trains in this State, and providing a penalty for the violation of this Act,' approved March 28, 1907, under which it is sought to recover from the defendant in this suit, is unconstitutional and void, for the following reasons:

"(a) Said Act, in requiring that each freight train consisting of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length grants privileges and immunities to companies and officers of court operating freight trains of less than twenty-five cars in length which are not granted to companies and to officers of court operating freight trains of more than twenty-five cars in length, and grants privileges and immunities to conductors and brakemen employed on freight trains of more than twenty-five cars in length, which are not granted to conductors and brakemen employed on freight trains of less than twenty-five cars in length, and is, therefore, contrary to and in conflict with Section eighteen, Article two, of the Constitution of Arkansas.

"(c) Said Act, in applying to freight trains of more than twenty-five cars in length, and exempting freight trains of less than twenty-five cars in length, is a denial of the equal protection of the laws to companies and officers of court operating freight trains of more than twenty-five cars in length, and to conductors and brakemen employed by companies and officers of court operating freight trains of less than twenty-five cars in length, and is, therefore, contrary to, and in conflict with Section one, of the Fourteenth Amendment to the Constitution of the United States.

III.

"(a) Defendant states that there are in the State of Arkansas many companies and officers of court owning and operating lines of railroad more than fifty miles in length and operating thereon freight trains of more than twenty-five cars, and that there are many companies and officers of court owning and operating lines of railroad less than fifty miles in length and operating thereon freight trains of more than twenty-five cars.

"That while this defendant owns and operates more than fifty miles of railroad, it also owns and operates in the State of Arkansas, many branches less than fifty miles in length, over which it operates freight trains of more than twenty-five cars; that the operation of said freight trains over said branches is in all respects similar to the operation of freight trains over lines of railroads of companies and officers of court owning and operating railroads less than fifty miles in length.

"(b) Said Act in applying to companies or officers of court owning or operating lines of railroad more than fifty miles in length, and exempting companies or officers of court owning or operating lines of railroad less than fifty miles in length, grants privileges and immunities to companies and officers of court owning and operating lines of railroad less than fifty miles in length, which are not granted to this defendant, and to other companies and officers of court owning and operating lines of railroad more than fifty miles in length, and grants privileges and immunities to conductors and brakemen employed by companies and officers of court owning and operating lines of railroad more than fifty miles in length, which are not granted to conductors and brakemen employed by this defendant, and other companies and officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in

conflict with Section eighteen, Article two, of the Constitution of Arkansas.

"(c) Said Act, in applying to companies or officers of court owning or operating lines of railroad of more than fifty miles in length, and exempting companies or officers of court operating lines of railroad less than fifty miles in length is a denial of the equal protection of the laws to this defendant and other companies and officers of court operating lines of railroad more than fifty miles in length, and is contrary to and in conflict with Section one of the Fourteenth Amendment to the Constitution of the United States.

"(d) Said Act, in applying to this defendant, and to other companies and officers of court, operating lines of railroad more than *fifty* miles in length, and exempting companies and officers of court owning and operating lines of railroad less than fifty miles in length is a denial of the equal protection of the laws to conductors and brakemen employed by companies or officers of court owning and operating lines of railroad less than fifty miles in length, and is, therefore, contrary to and in conflict with Section one, of the Fourteenth Amendment to the Constitution of the United States.

IV.

"Defendant alleges that it operates within the State of Arkansas six hundred and fourteen miles of railroad; that since said line of railroad consists of main track and several branches of less than fifty miles in length; that it operates over said lines of railroad an average of thirty-five freight trains per day, many of which trains are of more than twenty-five cars in length; that some of said trains are operated upon its main line, and some of said trains are operated upon its branches of less than fifty miles in length. That the fines imposed by said Act of Arkansas, No. 116,

approved March 28, 1907, are such that if defendant failed to comply with said Act, on each of its freight trains over twenty-five cars in length, operated in the State of Arkansas, the fines to which it would be subject would amount to a large sum, to-wit: about $12,500 per day, and, if continued during the time necessary to test the validity of said Act, would amount to a confiscation of its entire property within the State of Arkansas; that the fines imposed by said Act are, therefore, so excessive and burdensome as to deprive the defendant of its right to have the validity of said Act tested by the courts, and have the effect of depriving the defendant of its property without due process of law, and of denying to it the equal protection of the laws; that said Act is, therefore, contrary to and in conflict with Article two, Section nine, of the Constitution of Arkansas, and of Section one of the Fourteenth Amendment to the Constitution of the United States.

V.

"Defendant states that its said train was equipped with automatic couplers and air brakes, so that the cars thereof could be coupled and uncoupled without the necessity of brakemen going between the cars, and could be stopped by the application of the air brakes by the engineer of said train, without the intervention or assistance of the conductor or brakemen, as required by Act of Congress and the order of the Interstate Commerce Commission, made thereunder; that it had employed on said train a conductor and two brakemen, and that the employment of another brakeman on said train was unnecessary, because there were no duties connected with the running and operating of said train to be performed by a third brakeman, and said Act, in attempting to require the defendant to employ three brakemen on said train, attempted to require the defendant to expend a large amount of money for a useless and unnecessary purpose, and to deprive the defendant of its property without due process of

law, and is, therefore, in violation of and in conflict with Section one, of the Fourteenth Amendment to the Constitution of the United States.

VI.

"(a) Defendant further states that it is a common carrier of freight, engaged in interstate commerce, and that its said train was being used solely for the transportation of freight from points in the State of Arkansas, and points in other Territories and States west of the State of Arkansas, to Memphis, in the State of Tennessee, and other points beyond the State of Arkansas, and, therefore, was engaged in moving interstate traffic into and through the State of Arkansas, and that said Act, in requiring the defendant to equip said train with three brakemen, is an attempt to regulate commerce among the several States, and is, therefore, contrary to Section eight, Article one, of the Constitution of the United States, and is contrary to and in conflict with the Act of Congress, approved March 2, 1893, and amended April 1, 1896, entitled 'An Act to promote the safety of employes and travelers upon railroads by compelling common carriers, engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes,' and the Act of Congress, approved June 11, 1906, entitled 'An Act relating to liability of common carriers engaged in commerce between the States, and between the States and foreign nations to their employes,' and the Act of Congress, approved June 29, 1906, entitled 'An Act to amend an Act, entitled "An Act to regulate commerce," approved February 4, 1887, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' and other Acts of Congress which were passed pursuant to the power vested in Congress, by said Section eight, Article one, of the Constitution of the United States.

"(b) Defendant states that said Act is void, because the subject matter thereof has been legislated upon by the Congress of the United States, by the Acts hereinbefore referred to."

The two suits were identical, except in one of them it was admitted that in addition to the interstate commerce carried upon said train, plaintiff in error also carried intrastate commerce between points wholly within the State of Arkansas. At the trial the State demurred to each paragraph of the answers, and the court sustained said demurrer as to each paragraph, save and except paragraph number five. Upon the issue joined by the complaint and paragraph number five of the answers, a trial was had, and testimony was taken. The trial in both cases resulted in a judgment in favor of the defendant in error, the State of Arkansas.

The plaintiff in error appealed to the Supreme Court of Arkansas, where these judgments were affirmed. A writ of error was then prayed to this court.

The plaintiff in error has appended a supplement to its brief, which contains an abstract of the testimony as the same was filed in the Supreme Court of Arkansas pursuant to a rule of that court. The correctness of said abstract is hereby challenged, and more will be said of it at the proper place in our brief.

POINTS AND AUTHORITIES

I.

THE "FULL CREW ACT" OF ARKANSAS IS IN NO JUST SENSE A REGULATION OF INTERSTATE COMMERCE, BUT IS PURELY A POLICE REGULATION, AND AS SUCH IS NOT REPUGNANT TO SECTION EIGHT, ARTICLE ONE, OF THE CONSTITUTION OF THE UNITED STATES.

Gibbons vs. Ogden, 9 *Wheaton*, 1.

Walling vs. Mich., 116 *U. S.*, 446.

Hall vs. DeCuir, 95 *U. S.*, 485.

Railroad Company vs. Husen, 95 *U. S.*, 465.

Smith vs. Alabama, 124 *U. S.*, 465.

Sherlock vs Alling, 93 *U. S.*, 99.

Crutcher vs. Kentucky, 141 *U. S.*, 47.

Nashville, Etc., Ry. Co. vs. Alabama, 128 *U. S.*, 96.

Mobile County vs. Kimball, 102 *U. S.*, 691.

Western Union Tel Co. vs. James, 162 *U. S.*, 656.

Chicago, Etc., R. R. Co. vs. Solan, 169 *U. S.*, 133.

Gladson vs. Minn., 166 *U. S.*, 427.

N. Y., N. H. & H. Ry. Co. vs. New York, 165 *U. S.*, 628.

Erb vs. Morasch, 177 *U. S.*, 544.

L. S. & M. S. R. R. Co. vs. Ohio, 133 *U S.*, 286.

Hennington vs. Georgia, 163 *U. S.*, 299.

Pierce vs. Van Dusen, 98 *Fed.*, 693.

Southern Ry. Co. vs. King, *Vol.* 30, *Supreme Court Rep.*, *No.* 14, *p.* 594.

Western Union Tel. Co. vs. Kansas, 216 *U. S.*, 27.

Mo. Pac. Ry. Co. vs. Kansas, *Vol.* 30, *Supreme Court Rep.*, *No.* 9, *p.* 330

Thorp vs. Ry. Co., 27 *Ver.*, 129.

G. C. & S. F. Ry. Co. vs. Hefley, 158 *U S.*, 98.

Sinnot vs. Commissioners, 22 *How.*, 227.

Wisconsin vs. Duluth, 96 *U. S.*, 387.

Asbell vs. Kansas, 209 *U. S.*, 251.

Ried vs. Colorado, 187 *U. S.*, 137.

M. K. & T. Ry. Co. vs. Haber, 169 *U. S.*, 613.

Schlemmer vs. Ry. Co., 205 *U. S.*, 10.

II.

THE "FULL CREW ACT" AS APPLIED TO INTERSTATE COMMERCE IS A RIGHTFUL EXERCISE OF THE POLICE POWER INHERENT IN THE STATE; IS NEITHER ARBITRARY, UNREASONABLE NOR CONTRARY TO SECTION EIGHT, ARTICLE ONE, AND THE DUE

PROCESS CLAUSE OF SECTION ONE, OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Atlantic Coast Line R. R. Co. vs. North Carolina R. R. Commission, 206 *U. S.*, 1.

Tiedman on State and Federal Control, Vol. 2, *p.* 987.

Norwood vs. Baker, 172 *U. S.*, 269.

Wisconsin & M. P. R. R. Co. vs. Jacobson, 179 *U. S.*, 287.

L. S. & M. S. Ry. Co. vs. Smith, 173 *U. S.*, 684.

St. L. & S. F. R. R. Co. vs. Gill, 156 *U. S.*, 649.

Smyth vs. Ames, 169 *U. S.*, 466.

Minn. & St. Louis R. R. Co. vs. Minn., 186 *U. S.*, 257.

Dow vs. Beidelman, 125 *U. S.*, 680.

Chicago & G. T. R. R. Co. vs. Wellman, 143 *U. S.*, 339.

Covington & Louisville Turn Pike Co. vs. Sanford, 164 *U. S.*, 578.

Freund on Police Power, Sec. 63.

Ib., Sec. 549-550.

H. & T. C. Ry. Co. vs. Mayes, 201 *U. S.*, 321.

Cooley on Constitutional Limitations, 831.

License Cases, 5 *How.*, 579.

Louisville, Etc., R. R. Co. vs. Kentucky, 183 *U. S.*, 518.

Austin vs. Tennessee, 179 *U. S.*, 349.

Penn. Ry. Co. vs. Hughes, 191 *U. S.*, 477.

R. R. Co. vs. Fuller, 17 *Wall.*, 460.

L S. & M. S. Ry. Co. vs. New York, 165 *U. S.*, 629.

Ills., Etc., R. R. Co. vs. Illinois, 163 *U. S.*, 142.

State vs. Indiana, Etc., R. R. Co., 133 *Ind.*, 69.

Cooley vs. Board of Wardens, 12 *How.*, 299.

Owners of Brig Jane Gray vs. Owners of Ship John Fraser, Et Al., 21 *How.*, 184.

Steamship Company vs. Jolliffe, 2 *Wall.*, 450.

Olson vs. Smith, 195 *U. S.*, 332.

The William Law, 14 *Fed.*, 792.

III.

THE "FULL CREW ACT" OF ARKANSAS AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS IS NOT REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Atlantic Coast Line R. R. Co. vs. Mazursky, 216 *U. S.*, 122.

Hammond Packing Co. vs. State of Arkansas, 212 *U. S.*, 322.

Armour Packing Co. vs. Lacey, 200 *U. S.*, 226.

Kahrer vs. Stewart, 197 *U. S.*, 60.

Pullman Company vs. Adams, 189 *U. S.*, 426.

Osborne vs. Florida, 164 *U. S.*, 650.

C. B. & Q. Ry. Co. vs. Iowa, 94 *U. S.*, 155.

Ry. Co. vs. May, 194 *U. S.*, 267.

G. C. & S. F. Ry. Co. vs. Ellis, 165 *U. S.*, 150.

Atchison, Topeka, Etc., Ry. Co. vs. Matthews, 174 *U. S.*, 96.

Peik vs. Chicago, Etc., Ry. Co., 94 *U. S.*, 164.

People vs. Smith, 32 *L. R. A.*, 857.

State vs. Gerhardt, 33 *L. R. A.*, 319.

Interstate Ry. Co. vs. Mass., 207 *U. S.*, 88.

Mo., Etc., Ry. Co. vs. Mackey, 127 *U S.*, 205.

Holden vs. Hardy, 169 *U. S.*, 385.

Orient Insurance Co. vs. Daggs, 172 *U. S.*, 561.

Western Turf Ass'n vs. Greenburg, 204 *U. S.*, 362.

Hayes vs. Missouri, 120 *U. S.*, 71.

Jones vs. Brin, 165 *U. S.*, 182.

Mogoun vs. Ills. Trust & Savings Bank, 170 *U. S.*, 294.

Heath, Etc., vs. Worst, 207 *U. S.*, 354.

Welch vs. Swasey, 214 *U. S.*, 91.

McLean vs. State, 211 *U. S.*, 539.

St. Louis Consolidated Coal Co. vs. Illinois, 185 *U. S.*, 203.

ARGUMENT

I.

THE "FULL CREW ACT" OF ARKANSAS IS IN NO JUST SENSE A REGULATION OF INTERSTATE COMMERCE, BUT IS PURELY A POLICE REGULATION, AND AS SUCH IS NOT REPUGNANT TO SECTION EIGHT, ARTICLE ONE, OF THE CONSTITUTION OF THE UNITED STATES.

The "Full Crew Act" has been challenged by plaintiff in error as being an attempt on the part of the State to exercise the power, which, by the Federal Constitution, has been delegated to the central government. Section eight, of Article one, of the Constitution of the United States, confers upon Congress the power to regulate commerce among the several States. This delegation of power is contained in the following language: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

That the Acts of Congress passed in pursuance of this express delegation of power are supreme, is readily conceded. The decisions of this court from the days of its first great Chief Justice, until the present, thoroughly establish this fact.

Where there is a conflict between an Act of Congress and a State statute passed by virtue of the power reserved to the State, the State law must give way before the supreme authority of the Federal enactment. The second clause of Article six of the Constitution of the United States, settles this question, and were there any conflict between any Act of Congress and the "Full Crew Act" of Arkansas, we readily would admit the unconstitutionality of the latter Act. And while it is no longer an open question as to the result which must come from a conflict between State and National legislation, we earnestly submit that the decisions of this court, as far back as *Gibbons vs. Ogden,* 9 *Wheaton,* 1, sustain us in the contention that a State law which does not conflict with an Act of Congress, and which in its terms is not inconsistent with any part of the Federal Constitution, must be upheld, even though it may indirectly relate to the subject of commerce between the States.

In discussing this proposition, there are two questions which we will consider:

First. What is the true test to be applied to State legislation which indirectly affects interstate commerce? And,

Second. Does the "Full Crew Act" successfully meet this test?

First. As pointed out by the Supreme Court of Arkansas (Tr., p. 158): "In the regulation of interstate commerce there are three powers: The exclusive State power, the exclusive National power and the concurrent power."

As to the exclusive State power, it is not necessary for us here to determine. If the "Full Crew Act" is in any just sense a regulation of commerce, it must be conceded that it is such a regulation of interstate commerce as falls within either the exclusive National power, or that power which is concurrent, and which may be exercised by Congress, or in the absence of such Congressional exercise, by the State itself.

We submit that the "Full Crew Act," if it can be said to be a regulation of interstate commerce, is an exercise of a power which is concurrent in the State and the National Government.

In order successfully to assert this proposition, we will endeavor to establish the fact that the "Full Crew Act" is not such a regulation as comes within the exclusive power of Congress. If we succeed in this, it must necessarily follow that the power is concurrent in the State, until such action on the part of Congress as will entirely remove the subject from all State legislation.

The power of Congress to regulate interstate commerce is exclusive in all cases where the subject over which the power is exercised is, in its nature, national, or admits of one uniform system or plan of regulation. The inaction or silence of Congress upon such a subject is equivalent to a declaration that it shall be free from all State regulation or interference.

As was said by the Supreme Court of Arkansas (Tr., p. 158): "The silence of Congress indicates that it wills that said commerce shall be free and untrammelled by State legislation. To this extent—quick or dead—the power of Congress is exclusive."

Numerous decisions of this court may be cited in support of this well known principle.

Walling vs. Michigan, 116 *U. S.*, 446.
Hall vs. DeCuir, 95 *U. S.*, 485.
Railroad Company vs. Husen, 95 *U. S.*, 465.
Smith vs. Alabama, 124 *U. S.*, 465.

Is the subject covered by the "Full Crew Act" of Arkansas, national in its scope, and subject to a uniform system of regulation? We say it is not. The "Full Crew Act" of Arkansas is a legislative declaration by the General Assembly that local conditions are such in Arkansas as to make it unsafe and dangerous to property and to life to attempt to operate over rail-

roads more than fifty miles in length a freight train consisting of more than twenty-five cars, unless said freight train be operated by a crew composed of one engineer, one fireman, one conductor and three brakemen. It is a local condition which requires this. In other parts of the Union the same train might easily be handled with a smaller crew, and in still other parts of the Union, it might require a larger crew. What the conditions are in Arkansas which prompted this exercise by the Legislature of a power which is inherent in the State, appears, at least, to some extent, from the testimony taken under the fifth paragraph of the answers of the plaintiff in error.

It requires very little argument to establish the fact that regulations providing the size of the crew to which is entrusted the duty of transporting a freight train, must depend entirely upon local conditions. We take it that it would be impossible for Congress to adopt a uniform rule in this regard.

What would be a proper crew in New York, where the railroads have magnificent equipment for handling their transportation; where their tracks are built of heavy steel, and are firmly and thoroughly ballasted; where block signals are used; and where the necessities for switching by interstate trains are reduced to a minimum by reason of double tracks and other facili-

ties: would not be a proper crew to handle a freight train in Arkansas where the road beds are comparatively new, the steel comparatively light, the tracks unballasted, and where double tracks are unknown, where the amount of switching to be done, even by interstate trains, is enormous, and the dangers of collision and other accident is great. It can not be doubted for one moment that the number of employees required safely to operate a freight train, must necessarily depend upon the equipment which is used, the character of the country which is traversed, the general condition of the road bed with reference to the size of steel used, and whether or not it is thoroughly ballasted, and also with reference to cuts, curves, bridges and the like.

A train of twenty-five cars operated in the State of New York, upon a road which is comparatively straight, with four tracks over which the traffic is carried, with electric block signals, heavy steel, and over a country comparatively level, and with the road bed thoroughly ballasted, can certainly be operated with less men than a similar train traveling over a road in Arkansas, with single tracks, no electric block signals, poorly ballasted, with light steel, meeting other trains upon the same track at numerous points along the line, winding its devious way along the treacherous bank of some river, or creeping over the dangerous quag-

mire of some swamp, or with one curve following another, as it climbs some mountain.

We have some highways in Michigan upon which one horse could easily pull two tons of hay, while in Louisiana we have some roads over which it would require four horses to haul the same load.

We will not attempt to argue this question further. The mere statement of the proposition, it seems to us, is sufficient.

We call the court's attention to the following, which is taken from the opinion in *Smith vs. Alabama,* 124 *U. S.,* 465.

> "It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the teritorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans by which they may be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards and precautions. The

> width of the guage, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns and cities, are all matters naturally and peculiarily within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law."

We think it must readily be seen that the regulation of the number of employees to be used in the operation of a freight train, insofar as the same amounts to a regulation of interstate commerce, is such a regulation as may be exercised by both Congress and the State Legislature, subject, however, to the modification that whenever Congress speaks upon the exact subject, its *fiat* is supreme, and any State legislation which conflicts therewith must give way. That is to say, that in matters which are affected by local conditions (and certainly the regulation of train crews is such a matter), the power to regulate commerce is concurrent, except that where there is a conflict between National and State legislation, the former must prevail.

In speaking of the concurrent power of the State we do not mean to say that the State has reserved any power to regulate interstate commerce. What we are trying to say is that the State, in the exercise of other powers which are reserved, may legally enact laws on subjects local in their nature, but which incidentally and indirectly affect interstate commerce, and these laws are valid and enforcible until they conflict with some Act of Congress.

In *Gibbons vs. Ogden, supra,* Chief Justice Marshall, in discussing this question, said:

> "They show the opinion that the States retain powers enabling them to pass laws to which illusion has been made (referring to laws which indirectly affect interstate commerce), not that those laws proceed from the particular power which has been delegated to Congress. * * * Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an Act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come *into collision* with an Act of Congress, and *deprived* a citizen of *a right* to which that Act entitles him." (Italics are ours.)

In *Sherlock vs. Alling*, 93 *U. S.*, 99, cited and relied upon by plaintiff in error, Mr. Justice Field, in delivering the opinion of the court, said (page 103):

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In that case a statute of Indiana, giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, and providing "for the better security of the lives of passengers on board of vessels," was said to be constitutional and no encroachment upon interstate commerce as fixing the liability for injuries caused by colliding boats, both of which were engaged in interstate commerce.

In *Crutcher vs. Kentucky*, 141 *U. S.*, 47, we find this language used by Mr. Justice Bradley, who delivered the opinion in that case (page 61):

> "It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of

> railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, *with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce.* Such regulations are eminently local in their character, and in the absence of Congressional regulations over *the same subject*, are free from all constitutional objections, and unquestionably valid." (Italics are ours.)

In *Nashville, Etc., R. R. vs. Alabama*, 128 *U. S.*, 96, the same learned judge, in delivering the opinion of this court, said (page 99):

> "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employees and others on railroad trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had it is clearly within the competency of the States to provide against accidents whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, *there is danger to life or property*, it is not only within the power of the State,

but it is among their *plain duties*, to make provisions against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable." (Italics are ours.)

"Legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect interstate commerce. Citing *Mobile County vs. Kimball*, 102 *U. S.*, 691."

See also—

Western Union Tel. Co. vs. James, 162 *U. S.*, 656.

This court, in *Chicago, Milwaukee, Etc., R. R. Co. vs. Solan*, 169 *U. S.*, 133, discussing the power of the State to pass laws, which may indirectly and incidentally affect interstate commerce, says:

"It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those

> engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.
>
> "Such are the grounds upon which it has been held to be within the power of the State to require the engineers and other persons, engaged in the driving or management of all railroad trains passing through the State, to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains."

In *Gladson vs. Minnesota,* 166 *U. S.,* 427, it was held that a statute of the State of Minnesota, requiring every railroad to stop all regular passenger trains running wholly within the State at its stations at county seats long enough to take on or discharge passengers with safety, was a reasonable exercise of the police power of the State; nor did it, as applied to a train connected with a train of the same company, running into another State and carrying interstate passengers, unconstitutionally interfere with interstate commerce.

In disposing of the question, Mr. Justice Gray, who delivered the opinion of this court, used the following language:

"The principles of law which govern this case are familiar, and have been often affirmed by this court. A railroad corporation created by a State is for all purposes of local government a domestic concern. Even when its road connects, as most railroads do, with railroads in other States, the State which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience and comfort of the passengers and of the public. All such regulations are strictly within the police power of the State. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and *conflict* with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States."

In *N. Y., N. H. & H. R. R. Co. vs. New York*, 165 *U. S.*, 628, Mr. Justice Harlan, in construing the statute of the State of New York, regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles, said (page 632):

> "Persons traveling on interstate trains are as much entitled, while within the State, to the protection of the State, as those who travel on domestic trains. The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce So far as it may effect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the State to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several States, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, can be questioned."

In *Erb vs. Morasch*, 177 *U. S.*, 544, it was held that a municipal ordinance of Kansas City, Kansas, which restricted the speed of all trains within the city limits to six miles an hour, was a valid exertion of the police power of the State, although it was applicable to interstate trains.

The question was disposed of in the following language:

> "A city, when authorized by the legislature, may regulate the speed of railroad trains within the city limits. (Citing cases.) Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the State until at least Congress shall take action in the matter."

In *L. S. & M. S. Ry. Co. vs. Ohio,* 133 *U. S.,* 286, it was held to be a valid enactment to require railway companies operating within the State of Ohio to cause three of its regular passenger trains to stop each way daily at every town containing over three thousand (3,000) inhabitants.

In *Smith vs Alabama, supra,* it was held to be within the police power of the State to require locomotive engineers to be examined and licensed, although such engineers might be employed upon trains engaged in interstate commerce.

In *Hennington vs. Georgia,* 163 *U. S.,* 299, it was held that a statute of Georgia forbidding the running of freight trains on any railroad within the State on Sunday, although it affects interstate commerce, in a limited degree, was not for that reason a needless intrusion upon the domain of Federal jurisdiction. That it is not invalid as being repugnant to the Constitution of the United States, and must be respected in the courts of the Union until superseded and dis-

placed by some Act of Congress, passed in execution of the power granted it under the Constitution.

The defendant in that case was the superintendent of transportation of a railroad which was engaged in interstate commerce, operating in the States of Alabama, Mississippi, Tennessee and Georgia.

After reviewing the authorities on the question, Mr. Justice Harlan, who delivered the opinion of the court, sustained the State legislation in the following language (pages 317-318):

> "These authorities make it clear that the legislative enactment of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected by the courts of the Union until they are superseded and displaced by some Act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providviding for the public health, the public

morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic, as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their calling, the transportation of freight shall be suspended.

"We are of the opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States."

The same learned judge, in the opinion rendered in *L. S. & M. S. Ry. Co. vs. Ohio, supra,* says:

> "This power in the States (referring to the power to regulate the rights and duties of all persons within its jurisdiction to provide for the public convenience and public good) is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter conferred to it by the Constitution, then its statutes displace all *conflicting local regulations* touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the general government." (Matter in parenthesis and italics is ours.)

In that case, as stated above, an Ohio statute requiring the railroad company to stop its trains at certain stations was held not to be unconstitutional, even when applied to interstate trains carrying interstate passengers through the State of Ohio.

In *Pierce vs. Van Dusen*, 78 *Fed.*, 693, Mr. Justice Harlan, who rendered the opinion of the court, said:

> "States may do many things affecting commerce with foreign nations, and among the several States, until Congress covers the subject by national legislation."
>
> (Circuit Judges Taft and Lurton concurred in this opinion.)

In *Southern Ry. Co. vs. King, S. C. R., Vol.* 30, *No.* 14, *p.* 594, it is said:

> "It is consistent with the former decisions of this court, and with the proper interpretation of constitutional rights and laws, in the absence of Congressional action upon the same subject matter, for the State to regulate the manner in which interstate trains should approach dangerous crossings, the signals which should be given, and the control of the train required under such signals."

In *Western Union Telegraph Company vs. Kansas*, 216 *U. S.*, 27, we find a very recent expression of this court upon the power of a State to pass such laws as the one whose constitutionality is now in question.

Justice Harlan, who wrote the opinion of the court in that case, uses this language:

> "This has been done without violating the principles that a common carrier entering a State for purposes of its business, is subject to local regulations, that, in their essence and purpose, only incidentally affect interstate commerce, but are established in good faith for the protection, safety and comfort of the people, are not in themselves in any real, just sense, an obstruction to, or in conflict with, the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State, and are to be respected until Congress covers the subject by legislation. (Citing cases.)"

In *Missouri Pacific Ry. Co. vs. Kansas, S. C. R., Vol.* 30, *No.* 9, *p.* 330, it was held that interstate commerce is not directly burdened in violation of the Federal Constitution by an order of the State Railroad Commission, directing an interstate railway company to discharge its corporate duty by affording passenger train service between the terminus of a branch line within the State and the point of intersection at the State line, although to avert the useless expense of establishing terminal facilities at that point, the passenger service directed by the road must be operated not only to the State line, but some twenty miles beyond where such facilities do exist.

We have quoted thus at length from a number of previous decisions of this court. From these decisions and others, which it is not necessary here to mention, it seems to us manifest that the State has, in the exercise of its police powers for the protection of the life and property of its citizens, the undoubted right to enact such laws as the "Full Crew Act."

If Congress should see fit to legislate upon the question of railroad crews, then so far as that legislation conflicted with the State enactment, to that extent the State law would give way.

The "Full Crew Act" is not, in any strict sense, a regulation of commerce, either domestic or interstate.

In its final analysis, it is nothing more nor less than the exertion by the State of Arkansas of that great bulk of power which is reserved to every State, and which is ordinarily called the police power. Rights of people living within the State of Arkansas are subserved by such legislation. Not only is the life of the employee protected, but also the lives of others, as well.

It is a well known fact that a great many freight trains carry passengers as well as freight. The Legislature of Arkansas, knowing this fact, has provided for the better protection of the lives of those passengers, as well as the lives of the employees engaged upon the trains, and not only this, but the Act properly provides for the safe transportation of property, and as such it is, without question, a valid exercise of the police power reserved to the State.

Eminent counsel for plaintiff in error have cited several decisions of this court, upon which they rely. We shall briefly consider these cases:

The contention of plaintiff in error that the Act is "an attempt to regulate interstate commerce" "rests upon an erroneous assumption," and has no reason to support it. *(Hennington vs. Georgia,* 163 *U. S.,* 308*; Lake Shore & Mich. Ry. Co. vs. Ohio, supra.)* Appellant's citation from *Sherlock vs. Alling, supra,*

is not in point. They quote certain language to the effect that "the commercial power conferred by the Constitution is one without limitation," but they omit that part of the opinion which says: "In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution.

The case of *Hall vs. DeCuir, supra,* cited for plaintiff in error, was a case of a Louisiana law, requiring the owner of a steam boat to admit negroes into the cabins reserved for whites, and the court held that the statute requiring a negro to be put in such cabin on a vessel plying navigable waters of the United States, and engaged in interstate commerce, was a *direct* burden on such commerce.

The case of *Ry. Co. vs. Husen, supra,* was a case of an Act of Missouri which, as stated in the opinion (page 409), made "a *direct prohibition* against the introduction into the State of either Texas, Mexican or Indian cattle during eight months of the year,

without any distinction between such as may be diseased and such as are not."

This court said: "It is a plain regulation of interstate commerce, a regulation extending to prohibition." (Page 469.) "The object and effect of the statute are, therefore, to obstruct interstate commerce." (Page 470.)

Further on, the court said: "We admit that the deposit in Congress of the power to regulate commerce between States was not a surrender of that which may properly be denominated police power."

And in referring to that power, cited *Thorp vs. Railway Co.*, 27 *Ver.*, 129, saying: "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State."

May not *property*, as well as life and limb, be jeapordized by the breaking, wrecking or stoppage of heavy freight trains, on long lines not manned with sufficient crew to protect them against emergencies that often times occur?

The case of *G. C. & S. F. Ry. vs. Hefley*, 158 *U. S.*, 98, was decided in reference to a Texas Act with regard to *railroad charges*, which a railroad could not

obey *without violating a law of Congress*, and, of course, the court held the State law had to give way.

Counsel for plaintiff in error cite *Sinnot vs. Commissioners*, 22 *How.*, 227. We rely upon that case as an authority in our favor, and direct the court's special attention to the same.

At page 36 of their brief, they say:

> "The Supreme Court of Arkansas further errs, in our opinion, by holding that there is no inconsistency between the Acts of Congress and the Full Crew Act. It asumes that the Full Crew Act should be sustained if the railroads can comply with its provisions without violating the provisions of the Acts of Congress. This, we contend, is not correct."

In support of this contention, they cite and quote from the case of the *State vs. C., M. & St. P. Ry. Co. (Wis.)*, 117 *N. W.*, 686. They quote from this as an authority sustaining their point that it is not a question of whether or not the Act of the Legislature conflicts with an Act of Congress, so that the law of the State will be valid, so far as not antagonistic to the Federal law.

We do not think that this State decision, nor the decision of the Missouri court in *State vs. Mo. Pac. Ry. Co.*, 111 *S. W.*, 500, also quoted from by counsel

for plaintiff in error, is any authority in support of their contention, and if it is, it is clearly against the numerous decisions of this court.

The State of Wisconsin passed an Act prohibiting the employment of men, under certain conditions, for a longer period than eight hours out of the twenty-four. At the time this Act was passed, there was an Act of Congress in force, which prohibited the employment of men, under similar conditions, for a longer period than nine hours out of the twenty-four. The Act of Wisconsin is in direct conflict with the Act of Congress, and this repugnancy was recognized by the Supreme Court of Wisconsin in the case cited by counsel for plaintiff in error, and was made the chief ground of decision in the case quoted from. Congress, in acting on the matter of the hours of labor, recognized the fact that a certain number of hours of labor were proper, and the State was, therefore, precluded from demanding a less or a greater number of hours.

The Supreme Court of Wisconsin, in discussing this conflict, said:

> "The legislation fixing nine and thirteen hours respectively, as the permitted time of employment, was a declaration of Federal policy on that subject, and a State law excluding interstate railroads from the use of their employees on interstate

> commerce, for one of the nine hours, or for five of the thirteen hours, would be a *direct conflict* with that policy. The absence of such an employee at a small station upon an interstate road, might well be a most serious inconvenience and burden upon both the celerity and safety of interstate commerce past that station, and a requirement of such absence would be in direct antagonism to the Federal law permitting presence and employment." (Italics are ours.)

Not only did the Wisconsin law conflict with the Act of Congress with reference to the number of hours of continuous labor, but it also conflicted with reference to the time the Act should go into effect. The Congressional enactment provided a reasonable amount of time before the Act should take effect. This was to give the railroads sufficient opportunity to conform their operation to the requirements of the Act. The Wisconsin law, on the contrary, provided that it should be effective immediately. There was a conflict, therefore, in the time the Acts should take effect.

Congress had acted on the direct subject matter. There was a Congressional declaration to the effect that nine hours of consecutive hours of labor was not too much. The Legislature of Wisconsin came along afterwards, and from its Act, we see a Legislative finding to the effect that nine hours was too much,

and that only eight hours of consecutive labor could be required.

But passing from that, we are confident that the decision of the Supreme Court of Arkansas on the proposition that the "Full Crew Act" should stand, unless it conflicted with a Federal enactment, is sustained by the decisions of this court.

Counsel for plaintiff in error, in contending that it is not a question of conflict between State and Federal law that will determine the constitutionality of the "Full Crew Act," as measured by the Commerce Clause of the Constitution, have probably overlooked an authority which they, themselves, cited at page 29 of their brief.

The case quoted from is *Sinnot vs. Commissioners of Pilotage*, 22 *Howard*, 227, and the language referred to is as follows:

> "When, therefore, an Act of the Legislature of a State prescribed a regulation of the subject *repugnant to* and *inconsistent with* the regulation of Congress, the State must give way. (Italics are ours.)

They have also probably overlooked the quotation on page 30 of their brief, from *Wisconsin vs. Duluth*, 96 *U. S.*, 387, the pertinent part of which is as follows:

> "That when Congress has by any expression of its will, occupied the field, that action is conclusive to any right *to the contrary* asserted under State authority." (Italics are ours.)

They have also probably overlooked a similar statement in their quotation upon page 31, taken from the case of *Smith vs. Alabama, supra.* And certainly we are compelled to believe that they have forgotten the quotation from *Asbell vs. State of Kansas,* 209 *U. S.,* 251, and found upon page 34 of their brief. It is as follows:

> "There can be no doubt that this is the supreme law, *and if the State law conflicts with it,* the State law must yield. But the law of Kansas, now before us, recognizes the supremacy of the National law and *conforms to it.*" (Italics are ours.)

In the case of *Asbell vs. Kansas, supra,* this court, after affirming the right of the State of Kansas to pass inspection laws, the object of which was to exclude from said State cattle infected with contagious, infectious or communicable diseases, even though "it may have had an incidental and indirect effect upon commerce between the States," said:

> "The cause, however, cannot be disposed of without inquiring whether there was, at the time of the offense, any legisla-

> tion of Congress *conflicting* with the State law. If *such* legislation were in existence, the State law, so far as it affected interstate commerce, would be compelled to yield to its supreme authority." (Italics are ours.)

In the case of *Reid vs. Colorado*, 187 *U. S.*, 137, which was another cattle inspection case, we find this language:

> "This court has often said—and the principle has often been reaffirmed—that 'in the application of these principles of the supremacy of an Act of Congress, in a case where the State law is but the exercise of a reserve power, the *repugnance or conflict should be direct and positive*, so that the two Acts *could not be reconciled or consistently stand together.*" (Italics are ours.)

In the case of *M. K. & T. Ry. Co. vs. Haber*, 169 *U. S.*, 613, which was also a cattle inspection case, the court said:

> "May not these statutory provisions stand without obstructing or embarassing the execution of the Act of Congress? This question must of course be settled with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded *as inconsistent* with an Act of Congress passed in the execution of a clear power under the Constitution, *unless the repugnance or conflict is so direct and positive*

that the two Acts can not be reconciled or stand together." (Italics are ours.)

And in the same case, the court further said:

> "These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by National Legislation, any action taken by the State upon that subject that does not *directly interfere* with rights secured by the Constitution of the United States, or by some valid Act of Congress, must be respected *until Congress intervenes.*" (Italics are ours.)

In *G. C. & S. F. Ry. Co. vs. Hefley, supra,* the same thought was thus expressed:

> "Generally, it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislate upon the precise subject matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation."

In the case of *Asbell vs. Kansas, supra,* the Kansas statute was sustained, although for many years Congress has legislated upon the inspection of cattle. The court in that case, construing all of the Acts of Congress, including the Act of March 3, 1905, said:

> "The State law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus *avoiding a conflict* with the national law."

These cattle inspection cases are interesting in considering the question now before the court. We will not go into a lengthy discussion of these cases, but respectfully invite the court's careful attention to the extent to which State legislation is sustained therein.

It would seem that these Acts of Congress covered the entire field. Certainly, they covered the subject matter with reference to the inspection of diseased cattle. But this court said, in at least three cases, which have been cited and quoted from above, that this did not preclude the State, in the exercise of its police power, from passing laws which did not conflict with the national enactments. We confidently rely upon this proposition:

If the "Full Crew Act" does not conflict with any Act of Congress, it must be sustained as a constitu-

tional exercise of the police power, and as such it is not an invalid regulation of interstate commerce.

Second. Is there any conflict between the Acts of Congress and the "Full Crew Act?" We think that a reading of the Act is all that is necessary to say that this question must be answered in the negative.

Learned counsel contend that Congress has legislated upon the subject sought to be legislated upon by the Legislature when it passed the "Full Crew Act." In an effort to support this contention, they have recited the recent history of legislation by Congress upon the subject of interstate commerce. Briefly stated, that legislation is as follows:

The Act of February 4, 1887, entitled "An Act to Regulate Commerce." The Act of March 2, 1893, commonly known as the "Safety Appliance Act." Also the subsequent amendments to that Act. The Act of March 3, 1901, which required interstate carriers to make certain monthly reports to the Interstate Commerce Commission. The Act of February 23, 1905, which provided for the giving of medals for bravery to those who endeavored to prevent wrecks upon railroads. The Act of March 4, 1907, which was an Act limiting the hours of service of railroad em-

ployes. And also the "Employes' Liability Act," which was declared unconstitutional in 207 *U. S.*, 263.

There is absolutely no inconsistency or repugnancy between these enactments of Congress and the State law now under consideration. The "Safety Appliance Act" provides for the safety of employes engaged upon trains. The object of Congress in passing that Act, as stated by this court in *Johnson vs. Sou. Pac.*, 196 *U. S.*, 19, was to eliminate dangers occasioned by coupling and uncoupling cars. This court, in the last cited case, uses the following language:

> "The risk in coupling and uncoupling was *the evil* sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically."

In the case of *Schlemmer vs. Ry. Co.*, 205 *U. S.*, 10, we find this expression:

> "The object was to protect the lives and liabilities of railroad employes by rendering it unnecessary for the men operating the couplers to go between the cars."

Now Congress has never undertaken to say what should constitute a "full crew" engaged in interstate commerce, but it has said that "it shall be unlawful for any common carrier engaged in interstate com-

merce by railroad to use on its line any locomotive engine in moving interstate commerce, not equipped with a power driving wheel brake and appliances for operating the train brake system."

Section two, of the same Act of Congress, which is the Act of March 2, 1893, follows:

> "It shall be unlawful for any such common carrier to haul or permit to be hauled, or use on its lines any car used in interstate commerce not equipped with automatic couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars." (Act March 2, 1893, as amended.)

Can it reasonably be contended that the fact that a freight train had complied with these requirements would remove it from every other requirement the State might impose for the safety of its employes, or the safety of the lives or property of the public? No court has ever made any such ruling, and we can not believe that any court ever will.

L. S. & M. S. Ry. Co. vs. Ohio, supra.

Congress merely sought to protect railway employees against one constantly recurring danger, and did not thereby imply that there were no others to provide against. What benefit would the "Safety

Appliance Act" be to employes upon a freight train if the railroad company were permitted to operate that train with an insufficient number of men? Would the Act limiting the hours of service be effective as an Act to promote the safety of employes, if the number of employes employed upon a train were insufficient safely to operate that train?

It is interesting to note that the argument made by counsel for plaintiff in error is the same argument urged in *Smith vs. Alabama, supra;* and it is also the argument made in the stock inspection cases, which have been referred to above. Each time this court has denied the soundness of the argument.

A part of counsel's argument is very ingenious. They say upon page 26 of their brief that "the regulation of hours of work necessarily regulates the number of employes and serves the same purpose as a direct regulation on that point."

The logic of this argument is plainly fallacious. It reminds us of the proposition made by a school boy, after he had mastered the old algebraic formula which is to the effect that "if one man can move a given amount of sand in ten days, then that ten men could move the same amount in one day." After satisfying himself of the correctness of that proposition, he stated

it as a matter susceptible of proof that "if one ship could cross the ocean in ten days, ten ships could make the same voyage in one day."

It depends entirely upon the kind of work required to be done whether or not the regulation of the hours of work regulates the number of employes required. Three men could not run a freight train properly, if they were only required to work for a period of three hours. It takes just *so many men* properly to run a freight train of twenty-five cars in Arkansas. Of course if these men have to work too long, *they* become incompetent, but the fact that the hours of work is regulated, does not dispense with the necessity for a *sufficient number* of men to perform that work.

Of course, the ultimate object of both the Acts of Congress and the "Full Crew Act" is the protection of life and property, but that is no argument against the "Full Crew Act," because every Act of every department of government, both State and National, has for its object the protection of the rights of person and property, guaranteed to every American citizen by the Constitution.

The Acts of Congress, as well as the Acts of the several State Legislatures, all look toward the same end; that is to say, toward the protection of the peo-

ple in the exercise and enjoyment of the inalienable rights of American citizenship and the blood bought principles of American liberty.

The argument of counsel is, indeed, an argument in our favor, because the first duty of the Sovereign State is to her citizens. In return for their fealty and loyalty, she guarantees them protection, both in matters of person and of property.

Another ingenious argument which is directed against the "Full Crew Act" may be found on page 25 of the brief filed by counsel for plaintiff in error. It is nothing more nor less than a play upon the meaning of the word "brakeman." Counsel say that Acts of Congress require that the brakes be operated by the engineer, while the "Full Crew Act" directs that this duty shall be performed by the brakemen. The weakness of this argument is indicative of the merits of this question.

Counsel do not say anything about the numerous other duties which are required of brakemen, and they forget the fact that often times the air brake refuses to work, and then hand brakes have to be applied. They also forget the fact that if cars are disconnected from a train, that they must be stopped by the use of the hand brake. They forget the fact that the hose

which conveys the air must be coupled by the brakeman. And we think they forget a hundred and one other things which brakemen are required to do by the rules of their employers, and from the necessities of their employment.

But, worse than that, they misconstrue the "Safety Appliance Act." The "Safety Appliance Act" does not say that brakemen should not apply hand brakes. Nor does the "Full Crew Act," either expressly, or by a most far-fetched implication, say that brakemen must perform a duty which, by the Act of Congress, is required of the engineer.

We are going to leave this argument, and if counsel find any satisfaction in the same, we are contented to give them the full enjoyment thereof.

But, one other point along this line: On page 39, of their brief, counsel say that "the cases relied upon by the State are cases decided prior to that time, but now that Congress has entered upon this policy, State legislation must give way, and the silence of Congress on any particular detail of the subject, must be considered as an announcement that that detail must not be regulated by legislative enactment."

If the power exercised by the State of Arkansas, when the Legislature passed the "Full Crew Act," was such a power as fell within the exclusive jurisdiction of Congress, then the above reasoning would be good, and we would readily assent thereto, but we think we have sufficiently shown that Arkansas, in exerting this power, was not intruding upon a matter which had been conferred exclusively to Congress. We have sufficiently discussed this question in the earlier part of our brief.

We candidly state that if Congress had in any way attempted to direct the number of employes necessary to operate an interstate train, the reasoning of counsel for plaintiff in error would meet with our sanction, but Congress has not done this, and its silence is not to be taken as intending that this matter should be left free and untrammeled, because it does not come within that class of legislation which is within the exclusive power of Congress to enact.

It seems that no Legislature, State or National, may now pass any law which is not attacked by the railroads engaged in interstate commerce, if they are in any wise affected thereby. When Congress passes an Act under its undoubted power to regulate interstate commerce, the railroads come into the Federal court, through their agents and attorneys, who hold up their

hands in horror at the *alleged* encroachment by the Federal Government upon States' rights. If a State Legislature enacts a law which affects the interstate carriers, they attack that law immediately as being unconstitutional, a burden upon interstate commerce, and an effort upon the part of the State to exercise powers delegated to the central government. Wherever the people seek to place the restraining hand in an effort to protect their lives and their property from destruction by the interstate carriers, they are immediately confronted with the defiant policy of these carriers to ignore the laws regulating them, whenever possible, and to defeat the people, under whose authority they exist, in exercising the rights and powers secured to them under the fundamental law of the land.

In the instant case, however, the contention of the railway company must fail. It can not be maintained by authority, and it is not supported by reason. The Acts of Congress, and the "Full Crew Act" of Arkansas, cover different subjects, and in no wise conflict. Congress has seen fit not to legislate upon the question of the number of employes to be employed at a single time upon a freight train engaged in interstate commerce. This is so, because it is not a matter subject to national and uniform regulation, but is one,

which, in the very nature of things, must necessarily depend upon local conditions. The silence of Congress, therefore, is not to be taken as meaning that this subject shall not be legislated upon by the States.

As Congress has not covered this particular subject by appropriate legislation, the power is in the States to enact such laws, as the "Full Crew Act," and in so doing there is no interference or burden placed upon interstate commerce, so long as there is no conflict between such laws and the Federal statutes. In the instant case, there is no conflict; not the most remote.

But, if Congress has legislated upon the subject matter embraced by the "Full Crew Act," the State still has the right, in the exercise of her police power, to pass laws, looking to the protection of property and life, even though such laws might indirectly and incidentally affect interstate commerce.

The "Full Crew Act" of Arkansas is such an exercise of police power inherent in the State, and there being no conflict between the "Full Crew Act" of Arkansas, and the Acts of Congress, both will stand. Each, in its way, accomplishes beneficient results in the protection of the lives of men who handle the freight traffic of this State, as well as the lives and the

property of the public at large. They are each enactments, the purpose of which is to provide for the safety of life, and of property, and as such, the Acts of Congress and the "Full Crew Act" of Arkansas stand together without any inconsistency or conflict whatever.

II.

THE "FULL CREW ACT" AS APPLIED TO INTERSTATE COMMERCE IS A RIGHTFUL EXERCISE OF THE POLICE POWER INHERENT IN THE STATE; IS NEITHER ARBITRARY, UNREASONABLE NOR CONTRARY TO SECTION EIGHT, ARTICLE ONE, AND THE DUE PROCESS CLAUSE OF SECTION ONE, OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Closely connected with the question we have just been considering, is the contention of plaintiff in error, as embraced in the second subdivision of its brief, that, as tested by the Due Process Clause of the Constitution of the United States, the Act is void.

Much testimony was taken under paragraph five of the answer. Counsel for plaintiff in error have appended an abstract of that testimony to their brief, which we have heretofore challenged for incorrectness

and insufficiency. The testimony is of such a nature that it could not well be abstracted. So many details were investigated, that in order to get the full effect of the evidence taken on both sides, it is necessary that the entire testimony be read. For that reason, we are not attempting to abstract it.

The Supreme Court of Arkansas (Tr., p. 160) said: "It is not for the court to determine which side of that controversy has the best of the argument, that was for the Legislature. If it is a fair subject of controversy, whether the Act is promotive of the safety of the employes of a common carrier on a public highway, and of the passengers and travelers on said highway to have said legislation, then the action of the legislative department in the premises is conclusive, and this evidence clearly shows that it is a matter within the legislative discretion. It is only where the burden on the carrier is arbitrary, and without any corresponding benefit to the public, that the courts will interfere."

We submit that this statement of the law as made by the Arkansas court is sustained by the previous decisions of this court.

In *Atlantic Coast Line Ry. vs. North Carolina R. R. Com.*, 206 *U. S.*, 1, this court said:

> "In coming to consider the question just stated, it must be borne in mind that a court may not, under the guise of protecting private property, extend its authority to a subject of regulation, not within its competency, but is confined to ascertaining whether the particular assertion of the legislative power to regulate, has been exercised to so unwarranted a degree, as in substance and effect to exceed regulation, and to be equivalent to the taking of property without due process of law, or a denial of the equal protection of laws."

Mr. Tiedman, in his work on State and Federal Control of Persons and Property (Vol. 2, p. 987), sums up the established doctrine, as follows:

> "It is a judicial question whether a particular regulation is a reasonable exercise of police power. The public necessity of the exercise of police power in any case, is a matter addressed to the discretion of the Legislature, but whether a given regulation is a reasonable restriction upon personal rights, is a judicial question."

This court, in *Norwood vs. Baker*, 172 *U. S.*, 269, said:

> "But the power of the Legislature in these matters is not unrestricted. There is a point beyond which the legislative department, even when exerting

> the power of taxation, may not go inconsistently with the citizens' right of property."

Other cases in point, are as follows:

Wis. & M. P. R. R. vs. Jacobson, 179 *U. S.*, 287.

Lake Shore, Etc., Ry. vs. Smith, 173 *U. S.*, 684.

St. L. & S. F. Ry. Co. vs. Gill, 156 *U. S.*, 649.

Smith vs. Ames, 169 *U. S.*, 466.

Minn. & St. L. Ry. Co. vs. Minnesota, 186 *U. S.*, 257.

Dow vs. Beidelman, 125 *U. S.*, 680.

Chicago & G. T. Ry. Co. vs. Wellman, 143 *U. S.*, 339.

Covington & L. Turnpike Co. vs. Sanford, 164 *U. S.*, 578.

Freund on Police Power, Sec. 63

Ib., Sec. 549-550.

The question then, so far as it can be considered by the court, is whether or not the "Full Crew Act" is a reasonable exercise of the police power of the State. It is not a question of whether or not the police power has been wisely exercised, but it is a question as to whether or not there has been a reasonable exercise of that power.

We submit that a reading of the testimony is sufficient to show that there were certainly reasonble grounds for the exercise by the Legislature of Arkansas of the police power of the State.

And before commenting upon the testimony, we desire to remind the court of the following utterance, taken from *Atlantic Coast Line R. R. Co. vs. North Carolina Railroad Commission, supra:*

> "It follows, therefore, that the mere incurring of a loss from the performance of such duty does not, in and for itself, necessarily give rise to the conclusion of unreasonableness."

The fact then that the compliance by the railroad company with the "Full Crew Act" would require the outlay of an additional sum of money is not, by no means, to be taken as evidence of the fact that the requirement is unreasonable.

We direct special attention to the statements as to the evidence, made in plaintiff in error's brief (at pages 40-51), which are entirely unwarranted. Here is one of them:

"It appears from the testimony of all the witnesses that it has been the custom of *all* railroads in the Southwest, with the exception of the St. Louis, Iron Mountain and Southern Railway Company, to

operate freight trains with only two brakemen." (p. 40.)

Now, the testimony does not show that such has been the custom of all railroads in the Southwest, but, to the contrary, Tinsman, in testifying on that point, only named the Denver, T. P. & S. W., Santa Fe, Burlington, Chicago & Alton, and the N. W. & St. P. He adds, "In fact, I don't *know* of any roads west of Chicago, *that I know of*, that employ three brakemen. (Tr., p. 41.)

Maxwell merely said that he knew of the practice of a great many roads in the Southwest, and that they only had two brakemen on through trains, but he admitted on cross examination that they had three on other trains. (Tr., p. 53.)

Turner answered that he did not know of any roads in the Southwest, except the Iron Mountain, that had three.

Here is another:

"All of the witnesses who testified, and who had experience in the operation of trains with two brakemen, stated that two brakemen were amply sufficient for their safe and practical operation." (Tr., p. 41.) That statement is directly contrary to the testimony in this record.

W. C. Turner, for the State, qualified as an expert, and a freight conductor on the Iron Mountain, said: "I have had experience on this system as conductor, and I candidly state that *three brakemen are absolutely necessary for safe operation.*" (Tr., p. 73.)

W. E. Pearsall, for the State, fully qualified as an expert, and who had been a brakeman and freight conductor, said: "I *think three brakemen is more safe, both to employes and to the public.* (Tr., p. 105.)

Both Turner and Pearsall gave in detail the reasons why *three brakemen are required.* In addition to this, it was agreed between counsel for State and plaintiff in error that R. Kramer, F. M. Schultz, W. Dunn, R. R. Cook and E. E. Horner, all of whom are now in active service in Arkansas, would, if placed upon the stand, *testify to the same state of facts,* as have been testified, and express the *same opinion* as expressed by W. C. Turner and W. E. Pearsall, whose testimony is hereinbefore set forth, except that they would testify that on the Rock Island road they have been operating with *two* brakemen instead of *three.* (Tr., p. 122.)

Here, then, were five qualified experts with experience on plaintiff in error's trains, operated with only two brakemen, whose testimony was to the same

effect as that of Turner and Pearsall, freight conductors in service of the Iron Mountain, operating with three brakemen. It was also further agreed that B. W. Holbrook, now in the service of the Rock Island as freight brakeman, would testify and express the same opinion as Turner and Pearsall.

It was further agreed "that C. H. Terrill, W. G. Walsh, O. M. Mitchell and G. W. Anderson, now in the active services of the St. Louis, Iron Mountain and Southern Railway Company, as freight conductors, would, if placed upon the stand, testify to the same state of facts as have been testified to, and express the same opinions as have been expressed by W. C. Turner and W. E. Pearsall, whose testimony is hereinbefore set out." (Tr., p. 123.)

Here, then, are ten witnesses, who all gave it as their opinion that three brakemen were necessary for the safe operation of freight trains on railroads in this State.

Here is another:

"That the work of brakemen was greatly diminished by the equipment of trains with automatic couplers and air brakes." (p. 41.)

W. C. Turner, limiting his statement to the work required of freight conductors and *brakemen*, said:

"The amount of work required of the crew to do over what was prior to the application of the air brake and automatic couplers, has increased at least fifty per cent to the brakeman and conductor." (Tr., p. 78.)

He then gave in detail the reasons for that statement. It was agreed that ten other experts would have testified to the same effect.

Here is another one that is not true:

"It will be noted, however, that the witnesses who testify on this point have never operated a train with less than three brakemen, and therefore, did not testify from actual experience as to the operation of a train with two brakemen." (p. 40.)

We have just shown that such a statement is at utter variance with the testimony; and we have already given the names of four freight conductors, and one freight brakeman, from plaintiff in error's road itself, who had had experience in operating with two brakemen, and who, it was agreed, would testify just as Turner and Pearsall.

The next statement in plaintiff's brief (p. 42), after the one above quoted, is also incorrect and misleading. The evidence of Turner (Tr., pp. 71-105) was to the effect that it was a "daily occurrence" for

drawheads to pull out, and that it required three men to handle a situation of that kind. (Rule 366, Tr., p. 227), requires that conductors must collect and preserve all such draw heads, and take them to the terminal stations. Turner also showed that, with a long train, it was almost impossible in many cases to convey the necessary signals. That three brakemen were also necessary promptly to inspect for hot boxes and other things affecting the safe movement of the train. That often the "air pumps" gave out, and trains had to be controlled by hand brakes. That three brakemen are also needed for prompt handling of freight and better serving of the public. Now, the promotion of the public convenience is proper grounds for the exercise of the police power of the State. (See *Lake Shore & Mich. Sou. vs. Ohio, supra.*)

Plaintiff's claim that three brakemen were used on the Iron Mountain only "because of certain pressure brought to bear by the Trainmen Orders," is contradicted by the State's testimony. (Tr., p. 82-83.)

At the time of the socalled "pressure" the railroad officials made no question as to the necessity of three brakemen, but in the conference they conceded that "three brakemen were necessary on those through trains, except what they designated as 'red ball' trains." (Tr., p. 83.)

Nor is there any grounds for plaintiff's claim (p. 44), "that it must be admitted that in the ordinary operation of trains * * * assuming that the railroad operating them complies with the Act of Congress * * * there is no reasonable necessity for the employment of said additional brakemen."

Now, the Act of Congress merely requires air brakes and automatic couplers, but the proof shows that it is not an uncommon occurrence for the "air pump" to give out, and that the draw heads frequently pull out. The proof shows that such is a "daily occurrence." (Tr., p. 71-75.)

The proof also shows that these appliances have not lessened, but have actually increased the work to be done by freight crew, brakemen and conductors. (Tr., p. 73.)

Plaintiff's counsel say: "Act No. 116 contains no provision based upon the necessity for the use of said brakeman." To which we answer that the Act itself is a legislative determination that there was such necessity as to that class of railroads and trains to which it is made applicable, and the burden of proof is on plaintiff in error clearly to demonstrate that there could be no such necessity as to any such roads or trains; and such demonstration is not made com-

plete by the mere opinion by plaintiff's witnesses, especially when contradicted by twelve other witnesses, equally competent to testify on that question.

The contention of plaintiff in error that there can not be any stronger evidence of the unreasonable intent of the Act than this provision, to-wit: "Regardless of any modern equipment of automatic couplers and air brakes," is without merit. That clause was merely intended to say that the fact that such appliances were used on freight trains would not dispense with the requirements of the Act; and there is absolutely no ground for counsel for plaintiff in error to say: "The Legislature of Arkansas proposes to put a ban upon the use of these appliances and upon any further effort to perfect or invent other labor saving or life saving appliances." It merely meant to exercise the Legislature's judgment that three brakemen were necessary, even though such appliances were used.

Equally without point is the next contention, "That the Act does not state the services to be performed by any of said brakemen." Of course, it was to be understood that the three were to perform the same general character of services ordinarily performed by brakemen on a freight train. Nor is there any ground for the further contention that, "the duty

of brakemen heretofore has been to couple and uncouple cars, and assist in the stopping of trains."

The testimony of W. C. Turner who, it was agreed, would be corroborated by ten other witnesses, shows in detail the great number of duties brakemen are usually required to perform. (See Tr., pp. 71-105; see also the train rules.)

The Act does not say, as plaintiff in error claims, that three brakemen must be employed, whether necessary or not, but simply says that in the cases it provides for, they must be, whether automatic couplers or air brakes are used or not.

Counsel for plaintiff in error, in citing *Governor Hughes'* veto message, failed to state that the evidence in the hearing before him failed to show any such state of facts as the State presents in this record; and failed to state that in that hearing the railroad managers showed by Mr. T. C. Clark that "ninety per cent of our trains in New York State run from one point to another without a switch. On the Pennsylvania trains there is nothing for trainmen to do but ride." Now, in New York, nearly all the trains are double tracked and equipped with standard block signals. But the roads in Arkansas are not. They also failed to state that in that hearing it was ad-

mitted, on the part of those advocating the bill, that it ought not to apply to the New York Central. It is also to be noted that the veto message expressly says: "This bill, however, upon the *facts developed before me upon the hearing, and undisputed,* is clearly unconstitutional." No such case is presented here.

In *Houston & Texas Central Ry. Co. vs. Mayes,* 201 *U. S.,* 321, cited for plaintiff in error, the court said:

> "We think that an absolute requirement that a railroad shall furnish a certain number of cars, at a specified day, regardless of every other consideration, except strikes and other public calamities, transcends the police power and amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic and actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic, occasioned by wrecks or other accidents upon the same or other roads, involving the detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather."

Now, one of the very objects to be subserved by Act 116 is to lessen the danger of such wrecks and ac-

cidents, and its tendency to do so will make it an aid, and not a burden, to interstate commerce. In this very case (201 *U. S.*), the court says:

> "The States may not burden instruments of interstate commerce, whether by railroads or telegraph. * * * Upon the other hand, the validity of local laws, designed to protect passengers or employes, or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized." (See p. 328.)

We submit that the following propositions are sustained by reason and authority:

1. The police power resides in the State, and is not yielded to the national government.

Cooley Const. Lim., p. 831.

Misouri, Etc., Ry. Co. vs. Haber, supra.

2. States may enact police regulations concerning interstate commerce unless such regulations conflict with a law of Congress.

Licenses cases, 5 *How.*, 579.

3. The interference with interstate commerce to be invalid must be direct, not merely incidental.

Louisville, Etc., Ry. Co. vs. Kentucky, 183 *U. S.*, 518.

Austin vs. Tennesee, 179 *U. S.*, 349.

Gladson vs. Minnesota, supra.
Gulf, Etc., Ry. Co. vs. Hefley, supra.
Lake Shore, Etc., Ry. Co. vs. Ohio, supra.
Smith vs. Alabama, supra.

We especially call the attention of the court to the case of *Lake Shore, Etc., Ry. Co. vs. Ohio, supra.*

4. The matter of regulating appliances of cars, examination and qualification of trainmen and train crews is not one that requires a uniform rule, but may be regulated by the States.

N. Y., Etc., Ry. Co. vs. N. Y., supra.
Smith vs. Alabama, supra.
Nashville, Etc., Ry. Co. vs. Alabama, supra.

5. So long as Congress has not legislated upon the particular subject, these statutes are regarded as being in aid of interstate commerce and are a rightful exercise of the police power of the State.

Penn. Ry. Co. vs. Hughes, 191 *U. S.*, 477.
Nashville, Etc., Ry. Co. vs. Alabama, supra.
Chicago, Etc., Ry. Co. vs. Solan, supra.
Gladson vs. Minnesota, supra.
Crutcher vs. Kentucky, supra.
Pierce vs. Van Dusen, supra.
Railway Co. vs Fuller, 17 *Wall.*, 560.

In *Pennsylvania Ry. Co. vs. Hughes, supra,* the court, at page 490, says:

> "It is equally within the power of the State to prescribe safeguards and precautions, foreseen to be necessary and proper, to prevent by the anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and punish. The rules for the construction of railroads and for their management and designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control in some degree, the conduct and liability of those engaged in such commerce. *So long as Congress has not legislated upon the particular subject,* they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

Congress has never legislated upon the matter of train crews.

6. The State has the right to pass a law to secure the safety of passengers even on interstate trains while within its borders.

Smith vs. Alabama, supra

Lake Shore, Etc., Ry. Co. vs. N. Y.,
165 *U. S.*, 629.

N. Y., Etc., Ry. Co. vs. N. Y., supra.

Nashville, Etc , Ry. Co. vs. Alabama, supra.

Thorp vs. Ruthland, Etc., Ry. Co., supra.

Illinois, Etc., Ry. Co. vs. Illinois,
163 *U. S.*, 142.

Chicago, Etc., Ry. Co. vs. Solan, supra.

By this Act the Legislature declared that the equipment of a freight train consisting of more than twenty-five cars, and being operated on a line more than fifty miles in length, with three brakemen, would add to the safety of passengers traveling upon such railroad, and to the public generally. All presumptions in favor of the correctness of the finding of the Legislature must be indulged We submit, however, that even in the absence of such presumption, the evidence in this case is amply sufficient to convince the court that this legislation is both wise and necessary.

7. The rules prescribed by the State for the management and operation of railroads are not regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce.

Chicago, Etc., Ry. Co. vs. Solan, supra.

Smith vs. Alabama, supra.

Nashville, Etc., Ry. Co. vs. Alabama, supra.

Hennington vs. Georgia, supra.

Lake Shore, Etc., Ry. Co vs. Ohio, supra.

State vs. Indiana, Etc., Ry. Co.,
133 *Ind.*, 69-80.

8. Congress has the right to regulate pilots. Though it had legislated upon the subject, it did so only in one particular; and it was held that the State regulations were not inconsistent therewith, and were therefore valid.

Cooley vs. Board of Wardens,
12 *How.*, 299-315.

Congress has legislated as to the mechanical equipment of freight trains, but it has not legislated as to the crews of freight trains.

9. The matter of regulations of pilots is not one requiring a universal rule, but is a local one; and, except so far as it may conflict with congressional action upon the subject, may be regulated by the State.

Cooley vs Board of Wardens, supra.

Owners of Brig Jane Gray vs. Owners of Ship John Fraser, Et Al., 21 *How.*, 184-187.

Steamship Company vs. Jolliffe,
2 *Wall.*, 450-459.

Olson vs. Smith, 195 *U. S.*, 332-341.

The William Law, 14 *Fed.*, 792-794.

So the matter of train crews is not one requiring a universal rule, but is a local one; and may be regulated by States, unless it has been legislated upon by Congress.

10. If the subject is within the legislative power, then courts can not inquire into the wisdom, expediency or policy of the law, they can only make inquiry to determine whether or not the law is without any reason and therefore arbitrary.

Authorities cited, supra.

III.

THE "FULL CREW ACT" OF ARKANSAS, AS CONSTRUED BY THE SUPREME COURT OF ARKANSAS, IS NOT REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

Section two, of the Act, provides that "it shall not apply to any railroad company or officer of court whose lines are less than fifty miles in length."

The Supreme Court of Arkansas (Tr., p. 157), construing this section, said:

> "The proper construction to place on the Act, and that renders it valid, is: If the short line is in fact used as a con-

> tinuous line, with the main line, or in any other way as a part of it, and not as a separate line, merely connecting with it, then it is a part of the line, but if it is a mere connecting line separately operated—operated as an independent short line is operated, although owned by the company owning larger lines, then, it would not be within the statute."

The Supreme Court of Arkansas having construed the "Full Crew Act," the construction placed upon it by that court, will be followed by this court. The construction below is binding here.

Atlantic Coast Line Ry. Co. vs. Mazursky, 216 *U. S.*, 122.

Hammond Packing Co. vs. State of Arkansas, 212 *U. S.*, 322.

Armour Packing Co. vs. Lacey, 200 *U. S.*, 226.

Kahrer vs. Stewart, 197 *U. S.*, 60.

Pullman Co. vs. Adams, 189 *U. S.*, 426.

Osborne vs. Flordia, 164 *U. S.*, 650.

The classification fixed by the Legislature, which passed the "Full Crew Act," is clearly based upon the length of the road, and the number of cars in the train, and such a basis of classification is most certainly proper and legitimate.

In speaking of the classification of railroads by the Legislature, in the exercise of its power in regulating passenger and freight traffic, this court, in *Dow vs. Beidelman, supra,* said:

> "Whether the classification shall be according to the amount of passengers and freight carried or the gross or net earnings during the previous year, or according to the simpler or more sustained test of the length of line of the railroad, is a matter within the discretion of the Legislature. *If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision, securing to all the equal pro tection of the laws.*"

See also—

C. B. & Q. Ry. Co. vs. Iowa, 94 *U. S.*, 155.

St. L. & S. F. Ry. Co. vs. Gill, 165 *U. S.*, 649.

Ry. Co. vs. May, 194 *U. S.*, 267.

We can adopt no better argument in support of our contention that the classification is not arbitrary, than that employed by the Supreme Court of Arkansas in the opinion rendered by that court in the instant case (Tr., p. 153):

> "Applying this principle here, can the court clearly see that there is no fair reason for this law which would not require with equal force its extention to all

railroads, irrespective of their length, where the freight trains consist of more than twenty-five cars? It will be noticed that the Act does not apply to any line of railroad, however long, unless the freight trains consist of more than twenty-five cars. It thereby permits both long and short lines to run short freight trains without being amenable to this Act; and this question is whether the classifications of the railroads into long and short lines, divided at the point of fifty miles, is a just and reasonable one.

"That there is a marked difference in the management, control and operation of long and short line railroads is a matter of common knowledge, known to all observers. Great trunk lines have been constructed through the country that are highways of interstate and international commerce. Both freight and passenger trains pass back and forth upon them, every few minutes, and great speed is attained in their movement. On the other hand are found many short lines which supply the needs of small communities, and upon such lines there are but few trains, and those of light weight and of few coaches and cars in comparison with the magnificent passenger and tremendous freight trains moved upon the large trunk lines. Bringing the comparison more nearly home there are found in this State important through lines, upon which are moved many freight and passenger trains daily; and there are also found many short lines of railroad, some owned and operated by independent companies, and some operated

as branches and feeders to the larger companies, by whom they are owned or controlled. Upon these small roads the necessity of protecting trains from collision from either end is materially less than upon the great lines where the trains are more numerous, heavier and accustomed to a greater speed. The movement of a train is necessarily less fraught with danger, where there is no other train upon the line, or but few, than upon a line where trains are moving every few minutes, or every few hours. Short lines are usually light constructed, and carry light rolling stock in comparison to the great systems. These, and other matters of common observation of the difference between long and short lines of railroad can afford reasons why the Legislature should have untouched the short lines of railroad with legislation designed to promote safety in operation of long freight trains.

"To approach the question in another way: In *G. C. & S. F. Ry. Co. vs. Ellis*, 165 *U. S.*, 150, Mr. Justice Brewer, for the court, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'

"Is there some difference between lines over and under fifty miles in length which bears a proper and just relation to the requirements placed upon them by this Act? In one sense there can be no substantial difference between a railroad forty-nine miles long and one fifty-one miles long; but if there is a just distinction between long and short lines of railroad that will bear classification at all, then it is unobjectionable and necessary to draw the line somewhere, although it may, at the given point, be arbitrary.

"The Supreme Court of the United States, in *N. Y., N. H. & N. Ry. Co. vs. New York*, 165 *U. S.*, 628, dealt with this point. There was a statute of New York applying to railroads over fifty miles in length, forbidding them to heat their cars with stoves or furnaces, kept inside of the cars or suspended therefrom; and the court, through Mr. Justice Harlan, said:

" 'But it is contended that the statute is repugnant to the clause in the Fourteenth Amendment forbidding a State from denying to any person within its jurisdiction the equal protection of the law. This contention is based upon the clause of the statute declaring that it shall not apply to railroads less than fifty miles in length. No doubt the main object of the statute was to provide for the safety of the passengers traveling on what are commonly called trunk or through lines, connecting distant or populous parts of the country, and on which the perils incident to traveling are

greater than on short lines—local lines. But, as suggested in argument, a road only fifty miles in length would seldom have a sleeping car attached to its train; and passengers traveling on roads of that kind do not have the apprehension ordinarily felt by passengers on trains regularly carrying sleeping cars or having many passenger coaches, on account of the burning of cars in case of their derailment, or in case of collision. In any event, there is no such discrimination against companies having more than fifty miles of road as to justify the contention that there has been a denial to the companies named in the Act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business of the class to which it is made applicable.'

"There can be no distinction in principle between that legislation and this, and the classification there, identical with this, was sustained on the difference between the danger of operation on trunk lines and local lines.

"*Cotting vs. K. C. Stock Yards Co.*, 183 *U. S.*, 79, is pressed upon the court as authority declaring void the classification here made. While the principles involved in the *Cotting case* were the same involved here, and in the *New York case, supra*, the facts required a different application of them. In the first place, the subject of regulation here and in the New York case, was common carriers on public highways, which are burdened

with obligations which do not rest upon individuals and corporations not thus employed, as pointed out in the *Cotting case;* and in the second place, the Act there was so framed as to apply to one company, there were other companies engaged in like business and similarily situated in the State of Kansas. The classification was made to depend solely upon the amount of business, and fell upon one company alone, while other companies similarily situated, different only in the amount of business transacted, escaped. There was no question therein of public safety, or the safety of men engaged in public service.

"Other cases cited can be easily differentiated from this case and the *New York case,* but the differences are not important for the principles invoked in all of them are the same. The difficulty is in the application of them to the given statute, and this was well explained in *Atchison, Topeka, Etc., Ry. Co. vs. Matthews,* 174 *U. S.,* 96:

" 'While cases on either side and far away from the dividing line are easy of disposition, the difficulty arising as to the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided an opinion. To some the statutes presented seemed

> a mere arbitrary selection; the others it appeared that there was some reasonable basis of classification. * * * In some of them the court was unanimous. In others it was divided; but the division in all of them was, not upon the principal or rule of separation, but upon the location of the particular case on one side or the other of the dividing line.'
>
> "It is not for the court to say whether the classification is wise or unwise, but merely whether it has a reasonable relation to the object sought to be accomplished, provided that the object is one with which the Legislature has power to deal. If the classification is not arbitrary, but within reasonable limits as heretofore defined, then the courts must sustain it. The court regards this Act as falling within that class."

A separate and independent line, less than fifty miles long, in all ordinary cases, is built, owned and operated under different circumstances and conditions from one much longer than it, or one operated in connection with or under the control of a much longer line, of which it forms a part. On page 54 of their brief, counsel for plaintiff in error say: "We venture to say that it can not be shown that the length of a railroad has anything to do with the risk incurred by brakemen."

That might be true, if applied to one forty-nine miles long and another not very much longer, but

in all classifications, the line is to be drawn somewhere. It may be true that a city of forty-nine hundred inhabitants should be governed by the same law as one with five thousand inhabitants, but if the Legislature has the right to classify at all, it has the right to say where the line of demarkation shall be drawn. Counsel for plaintiff in error might as well argue that Section 6611 of the Arkansas Digest is arbitrary and unreasonable, because it allows a railroad seventy-four miles long to charge $3.70 for a through ticket, and will only allow a seventy-five mile road to charge $2.22 for the same distance. Not only that, but what right have they to assume that in all ordinary cases a road, not fifty miles long, and not operating as a part of another line, will be found operating the same kind of a freight train and under the same conditions as a road of much greater length? The Legislature, in the exercise of its right to classify, had a right to assume that in all ordinary cases, that would not be the case. And if plaintiff in error had a right to introduce evidence on that point at all, the burden of proof would be upon it to prove that in all ordinary cases such a short line operates the same kind of a freight train and under the same circumstances and conditions as the long line, or that the circumstances attending the operation of a train on such short line

would be as trying, and subject to as many emergencies as the operation of a like train on a much longer line. If there could be any reasonable dispute or doubt on that point, the legislative action is to be upheld.

Peik vs. Chicago, Etc., Ry. Co., 94 *U. S.*, 164
Dow vs. Beidelman, supra.

"The Legislature in determining upon the passage of the law, may make investigations which the courts can not. As a rule, the members (collectively) may be expected to acquire a more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be in favor of the validity of legislative action."

People vs. Smith (*Michigan*), 32 *L. R. A.*, 857.
State vs. Gerhardt, 33 *L. R. A.*, 319.

"It is not enough that a statute goes to the very verge of constitutional power. We must be able to see clearly that it goes beyond the power. In case of real doubt, a law must be sustained."

Interstate Ry. Co. vs. Mass., 207 *U. S.*, 88.

From the foregoing considerations and authorities, and the principles to be derived therefrom, we think it must be presumed that the Legislature was not guilty of arbitrary and unreasonable action when it classified the railroads by length, and the freight trains by number of cars composing the same. It had a right to assume that in all ordinary cases more brakemen would be required for a long train than a short one, and that there would naturally be more emergencies requiring the services of three brakemen on a twenty-five car train in operating on a long line, than there would be on a like train operating only on a short line. If they had a right to assume that there would naturally be difference in the danger or emergencies of operating a long train on a long road, from what there would be in operating it on a short road, or in operating a short train on a long road, they had a right to require provision to be made to guard against such, and to base a classification upon such difference.

Counsel for plaintiff in error cites the *Ellis case*, 165 *U. S.*, 150, and we cite the later case of *A. T. & S. F. R. R. vs. Matthews*, 174 *U. S.*, 103, which says: "The equal protection of the law which is guaranteed by the Fourteenth Amendment, does not prohibit classification," and quotes with approval *Barbier vs.*

Connelly, 113 *U. S.*, 27, holding in effect that no amendment to the United States Constitution was designed to interfere with the police power of the State.

> "The hazardous character of the business of operating a railway would seem to call for such legislation with respect to railroad corporations, having for its object the protection of their employes, as well as the safety of the public."
>
> *Mo., Etc., Ry. Co. vs. Mackey*, 127 *U. S.*, 205, approved in *Holden vs. Hardy*, 169 *U. S.*, 385.

The breaking or delayed movement of a freight train on a much traveled track is not only dangerous to the employees traveling thereon, but to the lives and property of others. In the exercise of its police power, and also the exercise of its regulation over public service corporations, especially those operating dangerous agencies, the Legislature had the right to pass this Act. It is no objection to the exercise of such power that it may leave untouched or unprovided for, other objects or things to which it might just as well have been applied, or that in particular cases its application may work a hardship as compared to certain others not subject to its requirements.

Such inequalities do not fall within the prohibition of Section eighteen of Article two, of our Constitution, or of the Fourteenth Amendment, if indeed Section eighteen applies to corporations. That it does not, see—

Orient Ins. Co. vs. Daggs, 172 *U. S.*, 561.
Western Turf Ass'n vs. Greenburg, 204 *U. S.*, 362.

In *Hayes vs. Missouri*, 120 *U. S.*, 71, the court said:

> "The Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed or by the territory in which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

See also—

Jones vs. Brin, 165 *U. S.*, 182.

> "The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limit of course."
>
> "Clear and hostile discriminations against persons and classes, especially such as are of unusual character, un-

known to the practice of our governments, might be obnoxious to the constitutional prohibition."

Mogoun vs. Ill. Trust & Savings Bank,
170 *U. S.*, 294.

The *Kansas City Stock Yards case*, 183 *U. S.*, 79, cited by counsel for plaintiff in error, affords a good illustration of "a clear and hostile discrimination," for the laws were so worded as to catch the Kansas City Stock Yard, and let out every other stock yard in the State. It was, therefore, in effect, just the same as it if had been special legislation aimed at the stock yard alone; and for that reason it was held void. (See page 103 of that case.) That case, therefore, has no possible application to the case at bar.

It should also be noted that the court in that case clearly distinguished it from a case of public service corporation. (See page, 93, *et seq.*, of the opinion. See also the language of the court on page 112 of that opinion.)

If it is unreasonable, the burden is upon appellant to show it. On page 54, counsel say, in effect, that the classification should have been based on the number of miles the train was actually operated, and that if it was operated "back and forth" upon a forty-nine mile line, until it went, in one day, the full distance

it could have gone on a fifty mile line, it ought to be in the same class as a train operated on a fifty mile line; and that because it is not put in that class, the classification is arbitrary. Now, we may concede for the sake of argument, that such classification, if at all practicable, might have been a reasonable one, but it does not follow that the classification made by the Act is arbitrary, and bears no reasonable relation to the purpose sought to be accomplished. In all ordinary cases, a freight train twenty-five cars in length, does not "see-saw back and forth;" and if in some cases it does, and the Act is made only to apply if the sum total of its "see-sawing" equaled or exceeded fifty miles, it would be practically impossible to enforce the requirements of such Act. Again, if a twenty-five car freight train, on a long line was only required to be manned with three brakemen, in case it should travel fifty miles a day, there would be equal uncertainty in the enforcement of the Act.

The question is not whether the Legislature might have adopted some other classification, but whether or not the one adopted is purely arbitrary, and bears no relation to any legitimate purpose sought to be secured.

See—

Heath, Etc., vs. Worst, 207 *U. S.*, 354.

Even if it be doubtful whether or not the requirements of the Act would really accomplish the purpose designed, that would not justify this court in holding it void.

In the case of *N. Y., N. H. & H. vs. N. Y., supra,* the court said:

> "There may be reasons to doubt the efficiency of regulations of that kind. But that was a matter for the Legislature to determine."

The Act passed on in that case did not apply to railroads less than fifty miles in length, and was attacked on that ground.

A very recent utterance of this court upon the question of classification, adopted by the legislative department, may be found in *Welch vs. Swasey,* 214 *U. S.,* 91. We quote the following from the syllabus:

> "Where the highest court of the State has held that there is reasonable ground for classification, * * * based on practical and not asthetic grounds, and that the police power is not to be exercised for purely asthetic purposes, this court will not hold that such statute upheld by the State court, prescribing the different heights (for buildings) in different sections of the city is unconstitutional, as discriminating against and denying equal protection of the law to

> owners of property, in a district where a lower height is prescribed."

The Arkansas Legislature passed an Act known as the "Mine Run Law." By the terms of this Act it applies to all coal mines in this State, where ten or more men are employed under ground.

The Supreme Court of Arkansas, in *McLean vs. State,* 81 *Ark.,* 304, upheld the constitutionality of this Act, and sustained the classification made by the Legislature, holding that the same was fair and reasonable, and had a just relation to the purpose sought to be accomplished. The *McLean case* was affirmed by this court in 211 *U. S.,* 539.

To a similar effect is *St. Louis Consolidated Coal Company of Illinois,* 185 *U. S.,* 203.

Both of these cases are in point. The Legislature undoubtedly had a right to assume that there would be more emergencies calling for three brakemen with a heavy train running on a long line than on a short line, and it is not for this court to say conclusively that the lawmakers had no reason for that assumption.

Since the above was written, the attention of the writer has been called to a decision of the Supreme Court of Indiana, in which an Act, in all respects

similar to the "Full Crew Act," was construed and held to be constitutional in its every provision. We invite the court's careful attention to the Indiana case, which is an authority directly in point. That case is:

P. C. C. & St. L. Ry. Co. vs. State of Indiana,
172 *Ind.*, 147; 87 *N. E.*, 1034.

Respectfully submitted,

HAL L. NORWOOD,
Attorney General,
For Defendant in Error.